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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935

No. 312

THE BALTIMORE AND OHIO RAILROAD COMPANY,
THE PENNSYLVANIA RAILROAD COMPANY,
THE RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, *et al.*,

Appellants

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ATLANTIC COAST LINE RAILROAD COMPANY, *et al.*,

Appellees

Appeal from the District Court of the United States for the Eastern District of Virginia

BRIEF FOR APPELLANTS ON REARGUMENT

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Appeal from the District Court of the United States For the Eastern District of Virginia

BRIEF FOR APPELLANTS ON REARGUMENT

FOREWORD

This cause involves the validity of an order of the Interstate Commerce Commission which purports to prescribe reasonable divisions of Commission-prescribed joint rates on citrus fruit from Florida to destinations in Official Classification territory. It was originally argued on January 14 and 15, 1936, and has been restored to the Court's calendar and is assigned for reargument on March 2, 1936.

Both on original briefs and original arguments, the principal matters discussed pertained to appellants' allegation that the prescribed divisions are so low as to result in confiscation of their property. In the light of these discussions appellants desire to bring to the attention of the Court certain additional considerations bearing upon that issue. These new matters, however, are so interrelated to matters in the original brief relating to the issue of confiscation that both for clarity and convenience the latter have been brought forward into this brief. It may, therefore, be understood that this brief, which will be confined to the issue of confiscation, supersedes the original brief on that issue, except for reference to factual detail, and except for the chapter on group confiscation.

OPINIONS BELOW

The opinion of the specially-constituted District Court (*Baltimore & Ohio R. Co. et al.* v. *United States*) is reported at 9 Fed. Supp. 181, and is reproduced in the record at pages 226-63. A memorandum opinion denying an application for stay, unreported, appears in the record at page 294.

The reports of the Interstate Commerce Commission, which are made a part of the orders assailed, are published at 194 I. C. C. 729 and at 198 I. C. C. 375. These reports are of record at pages 29-79 and 79-94, respectively.

QUESTION PRESENTED

This appeal, taken under the provisions of the Urgent Deficiencies Act of October 22, 1913 [1] by The

[1] 38 Stat. L. 219 (U. S. Code, Title 28, Sections 41 (28), 42-48).

Baltimore and Ohio Railroad Company and other Northern railroads from the final decree (R. 269-72, 278) of a three-judge District Court dismissing their bill to enjoin orders of the Interstate Commerce Commission, presents the question whether such orders,[2] which prescribe divisions of joint rates on citrus fruit from Florida to destinations in Official Classification territory,[3] should be permanently enjoined and set aside.

The order as to the future became effective on June 1, 1934, and is of continuing character, but by another provision it requires that an adjustment be made in accordance with the prescribed divisions on all shipments to Trunk Line and New England territories that moved subsequent to November 22, 1930. Between that date and June 1, 1934, 85,904 cars of citrus fruit so moved (Clark's Ex. No. C-6), and the ultimate payment by appellants to Southern lines of approximately $1,200,000 (R. 1256), is involved under such retroactive readjustment. The retroactive provision was construed by the court below as merely requiring the restatement of accounts. In denying the application for a stay that court said (R. 295):

> "* * * The only effect of the restatement of accounts will be to put the Southern lines in position immediately to bring suit for the amount

[2] Orders of the Commission of July 3, 1933, and January 8, 1934, as amended (R. 1623-33), herein referred to as "the order," entered in connection with its reports in *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C. 729; 198 I.C.C. 375 (R. 39-79, 79-94).

[3] Official Classification territory, herein referred to as Official territory, may be defined generally as that part of the United States lying east of the Mississippi and north of the Ohio and Potomac Rivers, including New England, portions of Virginia and West Virginia, and certain destinations in Missouri, Iowa, and Wisconsin. It is made up of three sub-territories, viz., Central, Trunk Line, and New England territories. The dividing point between Central and Trunk Line territories is the Buffalo-Pittsburgh line.

shown to be due. In the natural course of events, these suits will hardly be reached for trial before the case is decided on its merits by the Supreme Court of the United States, and it seems unlikely to us that any court would be willing to hear and determine the issues that would be involved in such cases, including the issue of confiscation, while this case is pending in that court. * * *"

STATUTE INVOLVED

The statutory provision involved is Section 15(6) of the Interstate Commerce Act (U. S. C., Tit. 49, C. 1, Sec. 15(6)), which authorizes the Commission, after hearing, to prescribe just, reasonable, and equitable divisions of joint rates. It is set forth in Appendix "A" to appellants' original brief.

Appellants also rely upon the Fifth Amendment to the Constitution, likewise set forth in the same appendix.

STATEMENT OF THE CASE

In *Fla. Frt. & Veg. Shprs. Protect. Asso.* v. *A. C. L.R.R. Co.*, 14 I. C. C. 476 (1908), the Commission prescribed from Jacksonville and other north Florida junctions to destinations in Official territory rates (called "proportional" rates) to be added to other rates (called "gathering charges") from citrus producing points in Florida to such north Florida junctions. Northern lines' agreed divisions of the proportional rates were specific amounts (called "specifics") per box, of an estimated weight of 80 pounds, for their services north of the gateways, of which Richmond, Va., was and is the most important.

In 1915, and again in 1917, increased costs of operation, and other changes in transportation condi-

tions, impelled the Commission to find that Official territory lines were entitled to general rate increases of 5 and 15 per cent, respectively (*The Five Per Cent Case,* 31 I. C. C. 351, 32 I. C. C. 325; *Fifteen Per Cent Case,* 45 I. C. C. 303). In these cases the Commission specifically authorized increases in all interterritorial rates to permit appellants to secure these respective measures of increase in their divisions. Appellants sought to secure such increases in the citrus fruit rates and in their divisions thereof, but Southern lines would not agree thereto. Moreover, despite the Commission's recognition of the increased value of appellants' service, their divisions of the citrus fruit rates were not revised to reflect the resulting change in the relative worth of their service contribution (R. 72, 561-66).

In 1918, the citrus fruit rates, in common with rates generally, were increased 25 per cent by authority of the Director General of Railroads, and the divisions of the Southern and the Northern lines were increased in that ratio. In *Ex Parte 74, Increased Rates, 1920,* 58 I. C. C. 220, the Commission found that the Southern and the Northern lines were entitled to general increases of 25 and 40 per cent, respectively. The citrus rates, in common with other interterritorial rates, were increased 33 1/3 per cent, which was more than enough to have given Southern and Northern lines respective increases of 25 and 40 per cent, but the divisions of both sets of carriers were increased 33 1/3 per cent. The result, of course, was that Northern lines obtained less, and Southern lines much more, than the Commission had found proper within their respective territories (R. 72,561-66).

Thus, the different measures of change in relative expenses of operation in Official and Southern territories during the period from 1908 to 1928, as recognized by the Commission in approving different measures of general increases for those territories, entitled appellants over the whole period to a 90 per cent increase in their original citrus divisions as compared with a 40 per cent increase authorized for Southern lines. Despite this recognition by the Commission, it came about through no fault or consent of appellants, but in the face of their active protests, that the citrus divisions of *both* sets of carriers were equally increased 50 per cent. Appellants, therefore, failed by 40 per cent to obtain the 90 per cent increase recognized as proper, while Southern lines secured a 10 per cent increase in addition to the 40 per cent increase approved (R. 72, 561-67).

Prior to the prescription in 1928 of new joint through rates on citrus fruit from Florida producing points to Official territory, the divisions of which are here involved, Northern lines' divisions of the old rates had become wholly inadequate properly to compensate them for their services in transporting and delivering citrus fruit because of their failure to reflect the greater measure of general increases in rates authorized for Official territory than for the south, and because of the heavy additional expenses incurred by Northern lines in the provision of more extensive perishable terminal facilities at principal destinations and the performance of numerous new and special services in connection with the handling of citrus fruit on the road and at such terminals.

Prior to the establishment in 1928 of the new joint rates on citrus fruit prescribed in *Florida R. R. Commissioners* v. *A. & R. R. R. Co.*, 144 I. C. C. 603, Northern lines' divisions were fixed amounts for their hauls from the gateways to the individual destinations, regardless of the particular origins in Florida. These divisions, called "specifics," were originally converted from amounts per 100 pounds to amounts per box upon the assumption, and the assurance of Southern lines, that the estimated weight of 80 pounds was ample to cover the actual average weight per box of all citrus fruits, which include oranges, grape fruit, lemons, limes, pineapples, and other articles taking the same rates as oranges and grape fruit. At no time did Northern lines agree or consent to transport more than an average of 80 pounds of citrus fruit under their per box specifics (R. 555, 573, 609-11, 617, 621-27).

Pending establishment by agreement or Commission action of a permanent basis of divisions of the new citrus rates, the Northern lines in Trunk Line and New England territories,[1] as a provisional or interim basis, made distribution of the freight revenues accruing under the new rates on the basis of reconverting their former per box specifics to amounts per 100 pounds using the same estimated weight of 80 pounds per box as had originally been employed in converting to amounts per box (R. 577).

When the Commission prescribed the new citrus rates in 1928, it found the average weight per box to be 90 pounds, but it is not clear from the various

[1] Described in footnote on page 3.

decisions of the Commission on the subject [2] whether this was a changed condition or not. To the extent, however, that the 80 pound estimated weight may have understated the actual average weight of all citrus fruit transported, the effect of this method of reconversion operated to give Northern lines increased divisions per 100 pounds. The carriers in Central territory, at the urgent request of Southern lines, and as a temporary measure only, converted their divisional per box specifics to a 100 pound basis using a 90 pound factor (R. 375, 573, 577, 578, 628).

The resulting bases of divisions were not satisfactory to Northern lines, because they failed properly to reflect the increased value of their services due to relative changes in transportation conditions applicable to the handling of citrus fruit in Official and Southern territories, and due to the greater measure of general increases authorized by the Commission for Official than for Southern territory. At no time had Northern lines consented or agreed that the provisional bases of divisions employed by them were sufficient or reasonable for their services (R. 573-74, 577-78).

In 1929, Northern and Southern lines, having failed to reach an accord in respect of divisions of joint interterritorial rates theretofore prescribed on classes and commodities, agreed to join in petitioning the Commission for a general investigation of divisions of such rates, including the rates on citrus fruit. Southern lines delayed, however, for about a year in

[2] *Fla. Frt. & Veg. Shprs. Protect. Asso.* v. *A.C.L. R.R. Co.*, 14 I.C.C. 476, 478 (1908); *Florida R.R. Commissioners* v. *A. & R. R.R. Co.*, 144 I.C.C. 603, 615, 616 (1928).

acting on the joint petition, and made no final reply to Northern lines until the filing by appellee Southern lines of their complaint in No. 24069—*Atlantic Coast Line Railroad Company, et al.*, v. *Arcade & Attica Railroad Corp. et al.*, on November 22, 1930. This complaint asked the prescription of divisions of citrus fruit rates to Trunk Line and New England territories only, and did not seek any change in the provisional basis of divisions applicable to shipments to Central territory. The Southern carriers then refused to join in a general petition, and the Commission's investigation, No. 24160, *In Re Divisions of Joint Interterritorial Rates Between Official and Southern Territories,* was instituted January 3, 1931, on petition of the Northern lines. Subsequently, on April 20, 1931, Northern lines filed a cross complaint in No. 24069 seeking the prescription of reasonable divisions of the citrus rates to Trunk Line and New England territories.

To prevent duplication, the general investigation was set for hearing on the same record with No. 24069, but the only rates specifically covered by the evidence which had been received in the general investigation prior to the submission of this case to the Commission were those on citrus fruits to Central territory. The practical effect of the procedure was thus to segregate an issue concerning divisions of rates on citrus fruit moving from Florida to destinations in Official territory from the general divisional controversy between appellants and the Southern lines (R. 41).[1]

[1] Hearings have now been had and briefs filed by Northern and Southern lines in the Commission's general investigation, No. 24160, as to divisions of rates on classes and commodities generally, except citrus fruit.

The original report of the Commission prescribing divisions (R. 39-79) put upon Southern lines the entire reductions which were made in the rates because of improved conditions in Florida [1], but gave to Northern lines only slightly greater revenues on the whole than they had obtained out of their inadequate divisions prior to 1928.

In the discussion preceding its ultimate decision, the Commission quoted from this Court's decision in *Beaumont, S. L. & W. Ry. Co.* v. *U. S.* 282 U. S. 74, 87, to the effect that it might, in the public interest, take into consideration the financial needs of a weaker road and give it a division larger than justice merely as between the parties would suggest in order to maintain it in effective operation as a part of an adequate transportation system, *provided the share left to its connections was adequate to avoid a confiscatory result.* The Commission thereupon referred to the divisional agreement which was in force prior to November 9, 1928, and indulged the *presumption* that the agreement, having been voluntarily entered into, was not confiscatory of the property of either group of carriers when it was entered into. Seemingly the Commission realized that the divisions which it was prescribing for Northern lines were extremely low and was making an effort to meet the requirement that such divisions should avoid a confiscatory result.

Upon the issuance of the Commission's decision Northern lines filed a petition for rehearing and the case was reopened for reconsideration on the record as made. The Commission's report on reconsidera-

[1] The prescribed divisions provided for some special deductions from the rates before dividing with the Northern lines. These were the so-called Florida arbitraries. They accrue to the lines in Florida in addition to a division of the balance of the rate.

tion (R. 79-94) in substance affirmed its original report.

Thereafter Northern lines filed a second petition for rehearing (R. 1578), supported by an affidavit and a cost study covering thousands of cars to destinations in Trunk Line territory (R. 1610), alleging for the first time that the divisions prescribed were confiscatory. This the Commission denied without report and without comment (R. 1629). *Four of the nine commissioners who acted upon this petition voted to grant it* (R. 1548, 1629). *Commissioners Eastman and Brainerd, both of whom formerly voted against the majority report, were absent.* In view of the Commission's having relied in its original report on a *presumption* as to the absence of confiscation, it is respectfully suggested that the Commission should not have denied Northern lines' second petition for rehearing in which they offered specific proof on the question, particularly as the validity of its order was dependent on the absence of confiscation. Cf. *Atchison, T. & S. Fe. Ry.* v. *U. S.*, 284 U. S. 248.

Thereafter appellants filed their bill against the United States in the District Court for the Eastern District of Virginia to set aside the Commission's orders. Other Official territory lines intervened in their behalf. The Interstate Commerce Commission and Southern carriers intervened as defendants. Answers were filed to the bill and intervening bill as amended (R. 146-50, 150-57), and hearing was held before Circuit Judge Soper and District Judges Way and Chestnut in September, 1934 (R. 97).

The record before the Commission, with all exhibits, was introduced before the lower court (R. 1213), as was a copy of the Commission's minute entry denying the second petition for rehearing (R.

1548). In addition, the court took 1,066 pages of oral testimony and received 70 exhibits.[1]

On December 1, 1934, the court rendered its opinion denying the injunction sought (R. 226-63). The court made no separate findings of fact and conclusions of law for reasons given in the opinion (R. 262), and in a letter written by Circuit Judge Soper to the parties the day before the decision was announced (R. 263). A final decree denying the prayer of the petition, and dismissing the petition and intervening petition, was filed December 31, 1934 (R. 269). From the final decree this direct appeal was taken under the provisions of the Urgent Deficiencies Act of October 22, 1913; 38 Stat. L. 219 (U. S. C., Title 28, secs. 41 (28), 42-48).

SPECIFICATION OF ERRORS ON THE ISSUE OF CONFISCATION

1. The Commission's order, as amended, was and is illegal and void because it requires appellants to accept, out of prescribed and non-confiscatory joint through rates on citrus fruit from Florida to destinations in Official territory, divisions for their hauls which are as to them and each of them confiscatory, in direct contravention of so much of the Fifth Amendment to the Constitution of the United States as provides that "no person shall be * * * deprived of * * * property without due process of law; nor shall private property be taken for public use without just compensation." (Assignment of Errors Nos. 1 to 9, inclusive.)

[1] Planographed copies of the exhibits introduced in court have been supplied to this Court and to the parties. The exhibits introduced before the Commission, Nos. 1 to 358, inclusive, are on deposit in the Clerk's office of this Court as original exhibits (R. 299). Both the record before the Commission and that before the District Court have been narrated in accordance with Equity Rule No. 75, and this narration, along with the stipulation, was approved by the District Court (R. 300).

2. The Commission's order, as amended, was and is arbitrary, illegal and void because the Commission did not, as required by Section 15(6) of the Interstate Commerce Act, give due consideration to the amount of revenue required by appellants and each of them to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transporting citrus fruit. (Assignment of Errors Nos. 1 to 9, inclusive.)

THE NATURE OF THE QUESTIONS PRESENTED UNDER THE ALLEGATION OF CONFISCATION

Appellants' principal contention in this case is that the Commission-prescribed divisions of rates on Florida citrus fruit are confiscatory in contravention of the Fifth Amendment to the Constitution. The division of joint rates is a legislative and not a judicial function. *Terminal R. Assn. of St. Louis* vs. *United States,* 266 U. S. 17; *Backus-Brooke. Co.* vs. *Northern Pacific Ry. Co.,* 21 Fed. (2d) 4, certiorari denied, 275 U. S. 562. The determination of constitutional-rights' issues is a judicial function. Congress (or the administrative body to which it has delegated its power) may legislate as to rates or divisions, but when the rates or divisions are prescribed and ordered into effect the question of whether they are confiscatory is a judicial one. *Monongahela Navigation Co.* vs. *United States*, 148 U. S. 312, 327. This Court has held that the Interstate Commerce Commission is not "a competent judicial tribunal" but "a subordinate administrative or executive tribunal." *Interstate Commerce Commission* vs. *Brimson,* 154 U. S. 447, 485.

Appellants in this case allege—

(a) That the Commission's order herein prescribes divisions on such a low basis as to result in confiscation of their property, in contravention of the Fifth Amendment to the Constitution, and

(b) That the methods pursued by the court below in reaching its conclusion that the prescribed divisions are not confiscatory, are fundamentally erroneous and constitute a denial of due process of law.

This Court has held that on the issue of confiscation those alleging it are entitled to the independent judgment of the Court as to both the law and the facts.

Ohio Valley Water Co. vs. *Ben Avon Borough,* 253 U. S. 287;
Bluefield Water Works & I. Co. vs. *Pub. Serv. Comm.,* 262 U. S. 679;
Ohio Utilities Co. vs. *P. U. Comm.,* 267 U. S. 359.

It has also held that when rates found by a lower court to be compensatory are attacked as confiscatory this Court may inquire into the methods pursued by the lower court in reaching its conclusion on the issue of confiscation; and that if the methods pursued are fundamentally erroneous the principle of due process is violated.

Chi. etc. Ry. v. *Pub. Util. Comm.,* 274 U. S. 344, 351;
Nor. Pac. v. *Dept. of Public Works,* 268 U. S. 39, 44.

This is *not* a case therefore where appellants are asking this Court to enter the domain of legislative

discretion and substitute its judgment for that of the administrative tribunal; i. e., they are not asking this Court to pass upon the "reasonableness" of the prescribed divisions, neither are they asking the Court to fix divisions. The Commission has here exercised the *legislative* function of prescribing divisions. This Court is now asked to exercise the *judicial* function of determining whether the divisions so prescribed result in confiscation and whether the principle of due process of law has been violated. *If the Court finds that appellants' constitutional rights have been infringed it would be necessary for the Commission to reconsider its prior determination in the light of the principles announced by the Court.*

Nor does the case fall within the rule that the concurrent conclusions of two lower courts will be accepted as final on appeal. The issue of confiscation was not raised before the Commission until the filing by appellants of a second petition for rehearing (R. 1583). This petition was denied by the Commission *without comment* (R. 1629). The "tribunal appointed by law and informed by experience"—*Illinois Central R. Co.* vs. *Interstate Commerce Comm.*, 206 U. S. 441, 454—has given no reasons for its denial of appellants' second petition. The Commission seemingly preferred to rest its judgment as to the sufficiency of the prescribed divisions to avoid a confiscatory result upon its prior finding that since the prescribed divisions would afford Northern lines slightly more revenue than they would receive under a former basis of rates and divisions it might be "presumed" that they were not confiscatory (R. 75, 87). Moreover, the weight that might ordinarily be due the Commission's judgment

on matters relating to transportation is here seriously impaired, if not altogether nullified, by the fact that *of the eleven commissioners who at one time or another have voted on this case six have actually voted either against the majority report or to grant appellants' second petition for rehearing* (R. 78, 1548, 1629).

The estimates of cost and supporting testimony relied upon by appellants to reveal the confiscation alleged were introduced in evidence in the court below, which held hearings for six days on the issue of confiscation, this for the reason that the Commission had denied appellants' second petition for rehearing, which tendered the cost studies to the Commission. It is highly questionable, therefore, whether there has been a concurrent conclusion by the Commission and the lower court; certainly there could have been no such conclusion *on the record as made before the District Court.* Moreover, as noted, the Commission is not a court but a "subordinate administrative or executive" tribunal and the two-court principle therefore, has no application. Certainly it has no application in a confiscation case as we shall now demonstrate in connection with the contention, somewhat weakly advanced by appellees, Atlantic Coast Line Railroad Company, et al., that the concurrent conclusion of the Commission and the lower court will be accepted as final by this Court. In the original brief of these appellees, page 28, the following statement appears:

> "Both the Commission and the District Court having thus considered and refused to recognize the reliability of these cost calculations, it is submitted that the case falls within the settled

rule that such concurrent conclusions upon issues of fact, even where confiscation is alleged, will be accepted as final on appeal."

In support of the proposition advanced six cases are cited as authority. In *Norton* vs. *Larney,* 266 U. S.. 511, the fact with respect to which both lower courts concurred was the identity of a person. In *Bodkin* vs. *Edwards,* 255 U. S. 221, both lower courts agreed that the facts necessary to constitute defendant a trustee for plaintiff had been established, while in *Baker* vs. *Schofield,* 243 U. S. 114, the two lower courts reached the same conclusion with respect to facts constituting fraud and breach of fiduciary duty. But even in these three cases where no question of confiscation was involved this Court, in stating the rule that when two courts have reached the same conclusion on a question of fact their finding will not be disturbed, added the qualifying words "unless it is clear that their conclusion was erroneous."

Illinois Central R. Co. vs. *Interstate Commerce Comm.,* 206 U. S. 441, also relied upon by appellees, concerned the validity of an order of the Interstate Commerce Commission which found an increase in certain rates to be unreasonable. In attacking the order, however, the railroads did not allege confiscation, nor did this Court consider that issue. Moreover, in stating the proposition that when findings of the Commission are concurred in by the Circuit Court, they should not be interfered with, the Supreme Court again added the important qualification "unless the record establishes that clear and unmistakable error has been committed" (p. 466).

The two cases cited by appellees where the issue of confiscation was involved are authority *against*

the proposition here advanced by appellees rather than for it. In *Columbus Gas Co.* vs. *Comm'n.*, 292 U. S. 398, 410, this Court, speaking through Mr. Justice Cardozo, said:

> "What has been said exhausts the points of difference between the decree and the report.
>
> "Other objections have been urged in respect of other points *as to which the Commission and the court concurred.*" (Italics supplied.)

Thereafter the Court examined and reached independent conclusions on certain points *as to which the Commission and the lower court had concurred.* The case in question is authority for the proposition that if persuasive evidence on the issue of the measure of appellants' operating expenses is arbitrarily rejected, such action is *equivalent in effect to an act of confiscation.*

The remaining case, *West* vs. *Chesapeake & Potomac Telephone Co.*, 296 U. S. 662, is also authority against the proposition for which it is cited. Two former cases therein followed clearly are contrary to any rule that the concurrent conclusion by a commission and a lower court are binding on this Court where confiscation is alleged. These cases are *Northern Pacific Railway Company* vs. *Department of Public Works*, 268 U. S. 39, and *Chicago, M. & St. P. Ry. Co.* vs. *Public Utilities Commission*, 274 U. S. 344, and in both of them the commissions and the lower courts involved were in agreement—they had reached a concurrent conclusion—but this Court followed the sound principle that where rates found by a regulatory body to be compensatory are attacked as being confiscatory it would inquire into

the method by which their respective conclusions were reached.

It is obvious, of course, that this Court can not exercise its independent judgment as to both the law and the facts if it accepts as final a concurrent conclusion on an issue of fact by the Commission and the lower court. The answer is that the rule in question has no application whatever where confiscation is alleged. Moreover, the Commission has not in the instant case made a finding or reached a conclusion on an issue of fact. It has simply refused to receive and consider estimates of cost tendered to it as evidence. Far from being a finding or conclusion on an issue of fact, the action in question is more in the nature of "a denial of right." Cf., *Atchison, T. & S. F. Ry. Co.* vs. *United States,* 284 U. S. 248.

ARGUMENT

I.

THE COMMISSION'S ORDER IS INVALID BECAUSE THE DIVISIONS PRESCRIBED FOR APPELLANTS ARE SO LOW THAT THEY FAIL TO DEFRAY OPERATING EXPENSES AND TAXES REASONABLY AND FAIRLY APPORTIONABLE TO THE TRAFFIC (ASSIGNMENT OF ERRORS NOS. 1 TO 9, INCLUSIVE).

A. Well-Recognized Standards of Comparison Show the Very Low Basis of Divisions Prescribed for Appellants.

1. The Prescribed Divisions, Based on One Season's Movement, Are So Low That They Yield Appellants $600,000 Less Annually Than Divisions Which Would Accrue on a Mileage Basis.

This Court has stated that—

> "• • • other things being equal, divisions made on a mileage basis will be the same as those made on the basis of relative costs."
>
> *Beaumont, S. L. & W. Ry.* v. *U. S.*, 282 U. S. 74, 88.

In order that the Court may at the outset obtain a general idea of the level of the divisions which the Commission found to be too high for Northern lines, as well as the level or measure of those which it prescribed, there is set forth below a self-explanatory compilation showing the revenue results of one season's movement of 29,221 cars to destinations in Trunk Line and New England territories:

The compilation follows:

Total revenue available for division between Northern and Southern lines (R. 347)	$10,318,873.06
Divisions, as settled (R. 594):	
North	$ 2,633,759.76
South	$ 7,685,113.30
Divisions, mileage basis (R. 594):	
North	$ 2,919,788.48
South	$ 7,399,084.58

It will be seen that the divisions *as settled*, and found by the Commission to be too high for Northern lines, yielded aggregate revenue to Northern lines which was approximately $286,000 annually *less* than the divisions on a mileage basis. The record shows that the *prescribed divisions reduce the revenue as settled* by an additional sum aggregating $314,000 (R. 1256), so that the *net effect of the Commission's order* is to prescribe divisions which yield to Northern lines an aggregate sum which is *$600,000 less than if they had received divisions on a mileage basis.*

2. A Comparison of the Prescribed Divisions with Local Rates Likewise Shows the Extremely Low Basis Prescribed for Northern Lines.

As further indicative of the very low basis of divisions which the Commission prescribed for Northern lines the following tabulation shows the Commission-prescribed joint rates from typical Florida producing points to New York and Philadelphia, along with the prescribed divisions north and south, in contrast with local rates north and south of Richmond.

STATEMENT OF TYPICAL PRESCRIBED RATES AND DIVISIONS IN CENTS PER 100 POUNDS AND RATIO OF PRESCRIBED DIVISIONS TO LOCAL RATES ON CITRUS FRUIT TO AND FROM RICHMOND, VA.

From Florida Origin	Prescribed Joint Rate	Prescribed Divisions		Local Rate		Ratio of Prescribed Division to Local Rate	
		South	North	To Richmond	From Richmond	South %	North %
				To New York, N. Y.			
Citra	97	74.7	22.3	79	66	94.6	33.8
Hastings	96	73	23	78	66	93.6	34.9
Deland	100	77	23	82	66	93.9	34.9
New Smyrna .	104	80.2	23.8	84	66	95.4	36.1
Winter Garden	105	82.2	22.8	85	66	96.7	34.5
Winter Haven	105	82.2	22.8	87	66	94.5	34.5
Ft. Pierce	110	87.3	22.7	91	66	95.9	34.4
Arcadia	110	87.3	22.7	91	66	95.9	34.4
Ft. Myers	111	88.1	22.9	93	66	94.7	34.7
				To Philadelphia, Pa.			
Citra	93	74.3	18.7	79	57	94.1	32.8
Hastings	92	73.5	18.5	78	57	94.2	32.5
Deland	96	77.8	18.2	82	57	94.9	31.9
New Smyrna .	99	80.4	18.6	84	57	95.7	32.6
Winter Garden	101	81.8	19.2	85	57	96.2	33.7
Winter Haven	101	82.9	18.1	87	57	95.3	31.8
Ft. Pierce	105	86.4	18.1	91	57	94.9	32.6
Arcadia	105	86.4	18.6	91	57	94.9	32.6
Ft. Myers	107	89	18	93	57	95.7	31.6

NOTE:—The joint rates, and the local rates to and from Richmond in the above table are reproduced from Ex. No. 125 (R. 586). The prescribed divisions are computed in accordance with the basis ordered by the Commission (R. 76, 77). The distances north of Richmond to New York and Philadelphia are 346 and 253 miles, respectively. The distances south of Richmond from the Florida points range from 675 to 896 miles (Hodkinson Ex. No. 2-A).

3. The Low Basis of Divisions Prescribed for Northern Lines is Further Emphasized by a Contrast of the Respective Car-Mile Earnings North and South of the Gateways.

As a further indication of the very low basis of divisions prescribed for Northern lines appellants refer to the well-established principle that car-mile earnings should decrease as distances increase or, stating it conversely, car-mile earnings for shorter should be greater than for materially longer hauls, and should vary inversely as the length of hauls.

St. Joseph Lead Co. v. *L. & N. R. R.*, 101 I. C. C. 352, 354;
Shearman Concrete Pipe Co. v. *St. L., S. W. Ry.*, 146 I. C. C. 534, 543;
Cons. Cottonseed Operating Co. v. *A. & M. Ry. & Bridge Term. Co.*, 182 I. C. C. 12, 13.

The weighted average short-line hauls north and south based on a single season's movement were south, 810 miles, and north, 358 miles, yet contrary to, and in disregard of, the principle above-mentioned the earnings per loaded car-mile under the prescribed divisions are almost 50 per cent higher in the south than in the north, the average earnings south being 31.4 cents and north about 21 cents. This subject is discussed in more detail in connection with another issue at page 139 *et seq.* of appellants' original brief.

B. Estimates of Cost Based on Appellants' Respective System Costs Per Total Car-Mile Establish the Fact of Confiscation.

The method employed by appellants to establish confiscation involved a use of their *respective* system unit expenses per total car-mile. The total car-mile expense unit is obtained as follows: The total freight car miles, including both loaded and empty cars, and also the total operating expenses and railway taxes, were ascertained for each carrier from the statistical reports furnished by it to the Commission, and these costs were separated as between freight and passenger traffic in accordance with a formula prescribed by the Commission for such separation. Deductions from total freight expenses were made for freight train car repairs, depreciation, and retire-

ments, since citrus fruit is moved in refrigerator cars, not owned by the carriers but rented at the rate of 2 cents per mile. Then the net freight expense was divided by the total freight car miles and a unit expense per car mile for all freight traffic was ascertained. To this was added 2 cents per car mile as rental for refrigerator cars. The resulting unit expense was then applied against the total car miles involved in the movement of each of 17,324 cars to points in Trunk Line and New England territories and 4,662 cars to points in Central territory.

It is settled that where the expenses and taxes apportionable to a service are greater than the revenues derived from that service, or only a nominal profit is returned, evidence of the value of the carriers' property used in the performance of that service is not required to establish the fact that the rate is confiscatory.

N. & W. Ry. Co. vs. *Conley,* 236 U. S. 605;
Banton vs. *Belt Line Ry. Co.*, 268 U. S. 413, 425;
N. P. Ry. Co. vs. *North Dakota,* 236 U. S. 585.

1. The Deficits Sustained by the Three Principal Appellants, on a Movement of 17,324 Cars, Amount to $53,469.79.

The confiscatory character of the prescribed divisions is shown of record, so far as the three Northern lines principally interested are concerned, by a study embracing 17,324 cars of citrus fruit moving in the 1928-29 shipping season. These were all the cars that originated on the Atlantic Coast Line and the Seaboard Air Line in Florida in that season which moved for single-line hauls, or substantially single-

line hauls, to destinations on the Pennsylvania and the Baltimore & Ohio in Trunk Line territory.

The following table shows the results of this study for the three Northern lines as a group, as well as individually (Hodkinson Exhibits Nos. 6, 6-A, and 10):

17,324 CARS TO TRUNK LINE TERRITORY

North

Revenues under prescribed divisions	$1,247,237.52
Estimated expenses	1,300,707.31
Deficit	$ 53,469.79

Subdivision of Revenues and Expenses North—17,324 Cars

Carrier	Revenues under Prescribed Divisions	Expenses	Deficit
P. R. R.	$748,339.98	$813,918.88	$ 65,578.90
R. F. & P.	411,051.64	412,311.20	1,259.56
B. & O.	87,845.90	74,477.23	13,368.67*

* Surplus.

2. The Joint Rates Are Sufficient to Give Both Northern and Southern Lines Returns of 5¾ Per Cent and Still Provide an Additional Sum Aggregating $700,000 for Southern Lines' Special Needs if That Course Is Otherwise Appropriate.

The burden upon appellants of showing confiscation might not be fully carried without a showing that, while they will receive less than a fair return, the Southern lines will receive more than a fair return out of the prescribed divisions. This for the reason that the entire through rates as prescribed by the Commission might be confiscatory, and a fair and equitable division of such rates would necessar-

ily result in confiscatory divisions to both sets of carriers. Therefore in this case appellants have felt that it was incumbent upon them to compare the revenues received by both sets of lines by the same yardstick so that it could be demonstrated that the prescribed divisions for appellants would not produce anything, or only a nominal amount, toward a fair return, while, for the Southern lines, the same yardstick would produce amounts sufficient to pay far more than a fair return.

In the table below, therefore, there is shown the revenue accruing to the Atlantic Coast Line and the Seaboard Air Line on the same 17,324 cars, along with estimated expenses incurred by those lines in handling the traffic computed by the use of precisely the same method as was used for obtaining the estimated expenses for Northern lines. The table follows (Hodkinson Exhibits Nos. 6, 6-A, and 10):

17,324 CARS—FLORIDA TO RICHMOND

Revenues under prescribed divisions	$4,702,160.98
Estimated expenses	2,935,082.12
Available for return on investment	$1,767,078.86
5¾% return (A.C.L.—S.A.L.)	784,404.10
Surplus over 5¾% return	$ 982,674.76

It will be seen that even after an allowance to Southern lines of over $784,000 for a 5¾ per cent return on investment, the prescribed basis of divisions yields a surplus to these two Southern lines of more than $982,000. The sum of $276,084 over and above estimated expenses would yield to Northern

lines a 5¾ per cent return on the 17,324 cars studied (Hodkinson Ex. No. C-19, R. 1546-47). These facts disclose the very low basis of divisions prescribed for Northern lines, and also demonstrate that, for example, if both Northern and Southern lines were given returns of 5¾ per cent, the joint rates would still suffice to provide an additional sum aggregating over $700,000 out of which the Commission could make special provision for Southern lines' alleged financial needs, if in the public interest it deemed that course otherwise appropriate.

3. The Prescribed Divisions to Central Territory Yield but a Nominal Return Over and Above Operating Expenses.

The revenue results as to the smaller total movement to Central territory are shown by studies embracing 4,662 cars, all of which moved for single-line hauls. The table below shows the revenue effect of the prescribed divisions:

4,662 CARS MOVING TO CENTRAL TERRITORY DESTINATIONS

Revenues under prescribed divisions	$285,064.02
Estimated expenses	232,456.87
Surplus	$ 52,607.15

While there is an indicated surplus of $52,607 on these 4,662 cars, $39,644.92 of this surplus is accounted for by 1,253 cars which moved for very short distances (Hodkinson Ex. No. C-7). These cars are affected by the minimum provision of the Commission's order and the costs allocated to them are thus very much *understated*, as fully explained by Witness Hodkinson (R. 1320-22). At most, therefore,

the bulk of the cars to Central territory points produced but a nominal amount over and above expenses and taxes. The data as to individual hauls and individual lines in the case of the Central territory cars are included in Hodkinson Exhibit No. C-6.

The accuracy of the foregoing estimates of cost is not questioned. The contested issue is as to their reliability. It will at once be seen that if such estimates of cost are the result of reasonable determinations, appellants' allegations as to the confiscatory character of the prescribed divisions have been sustained. Appellants insist that the estimates of cost have been reasonably determined, because the principles which underlie them are sound and such assumptions as are made are reasonable in the light of the facts of record, as will subsequently appear.

C. The Principles Which Underlie Appellants' Estimates of Cost are Sound and Such Assumptions as were Made are Reasonable.

1. It is Impossible to Determine the Exact Cost of Transporting Any One Commodity in Freight Service. Both This Court and the Commission Have Recognized the Difficulties Involved and Have Indicated That at Times Resort May Be Had to System Average Costs of All Transportation Per Unit of Traffic.

In order that there may be no misapprehension as to the nature of appellants' estimates of cost, or what they claim for them, appellants desire to make it clear that they make no contention that they have here shown exact cost. The science of railway cost accounting has not developed to a point where a railroad can apportion to the transportation of a particular commodity with exactness its fair proportion of

costs incurred in common with the transportation of other commodities or of passengers. The Commission has recognized this. For example, it has said:

> "* * * it is impossible on a system like the defendant's, engaged in the general transportation of all kinds of freight and of passengers, to determine accurately the exact cost of transporting any one commodity."
>
> *Georgia Pub. Serv. Comm.* vs. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, 187.

> "We appreciate the difficulty of even fairly approximating the cost of transporting a unit of freight and realize that any method employed must necessarily be somewhat arbitrary."
>
> *Sloss-Sheffield Steel & Iron Co.* vs. *L. & N. R. R. Co.*, 30 I. C. C. 597, 602.

> "It is extremely difficult if not impossible to ascertain accurately the cost of transporting a particular kind of traffic for a certain distance."
>
> *Sugar from Key West*, 112 I. C. C. 347, 348.

The instant case deals with the cost of transporting a single commodity in expedited and special freight service. Appellants, in bearing the burden of establishing confiscation, can not be expected to perform an impossible task. The record here is definitely to the effect that *special* cost studies would have been impracticable (R. 1223, 1268, 1277, 1279). Recognizing the difficulties inherent in determining the transportation costs of handling a single commodity or kind of traffic, both this Court and the Commission have at times indicated that resort may

be had to average costs of all transportation per unit of traffic.

A. C. L. R. R. v. *Florida*, 203 U. S. 256.
Wood v. *Vandalia R. R. Co.*, 231 U. S. 1, 6, 7.
Smyth v. *Ames*, 169 U. S. 466.
Georgia Pub. Serv. Comm. v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, 184.

Decisions of this Court have likewise held that divisions of rates prescribed by the Commission "must be adequate to avoid a confiscatory result."

New England Divisions Case, 261 U. S. 184, 194-95;
Dayton-Goose Creek Ry. v. *U. S.*, 263 U. S. 456, 477;
United States v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 284-85.

Having recognized the right of carriers to protection under the Fifth Amendment against non-compensatory divisions, it can not be supposed that the court will require an impracticable or impossible exactness in order to establish confiscation. To do so would be to convert such protection into an illusion and would, for all practical purposes, deny carriers any protection under the Fifth Amendment. Appellants insist that reasonable determinations only are required and these they further insist have here been made.

2. In Bearing the Burden of Proof of Establishing Confiscation Appellants May Not be Held to an Impracticable Exactness. Reasonable Determinations Only are Required.

In *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, supra, the Commission specifically approved the use of a system average cost unit and made specific findings as to the cost of handling log traffic in Florida for the purpose of establishing

that the intrastate log traffic in Florida was a burden on interstate commerce. The case subsequently was appealed to this Court, which in *Florida* v. *United States*, 292 U. S. 1, 9, quoted certain of the Commission's findings as to cost, preceding which the Court said:

> "• • • The requirement of essential findings as to revenues did not demand an impracticable exactness. Losses through inadequate rates could be shown satisfactorily even though proof of the precise extent of such losses was not available. Reasonable determinations were required and these were made."

Paraphrasing this language, appellants insist that the burden upon them of establishing confiscation does not "demand an impracticable exactness." Losses to them through inadequate divisions may be shown satisfactorily even though proof of the precise extent of losses is not available. "Reasonable determinations" only are required.

The foregoing and other cases all stress what would be a "reasonable" determination under all the circumstances. For example, in *A. C. L. R. R.* v. *Florida, supra*, this Court indicated that facts "from which a *reasonable deduction* can be made as to the cost of transportation" might be sufficient. The Commission, in *Refrigeration Charges on Fruits, etc., from the South*, 151 I. C. C. 649, 672, said:

> "• • • In any cost study assumptions are inevitable, a fact which is attested by the cost analyses which respondents have themselves submitted in this case. The important question is whether such assumptions as are necessary are also *reasonable.*" (Italics supplied.)

3. The Use of a System Average Unit of Cost is Justified Here and it Results in a Reasonable Determination Because Citrus Fruit is More Expensive to Handle than the Average or General Run of Freight, and in Addition the Particular Portions of Appellants' Lines Used in Transporting Citrus Fruit are More Expensive to Operate than Their System Lines Generally.

In the instant case appellants have submitted estimates of cost which they insist are *less* than the actual cost of handling citrus fruit. These estimates are based on the system total car-mile cost units of the respective lines involved.

The Government on brief, page 44, says:

> "* * * appellants' theory is nothing more nor less than an assumption that this average car-mile figure is the same as the average car-mile cost of handling citrus fruit traffic."

If appellants had used a system unit of cost for all traffic, and had done nothing more, this would be a correct statement. The record, however, overwhelmingly and convincingly establishes that the cost of handling citrus fruit per total car-mile is *more* than the system average cost of handling all traffic per total car-mile because—

> (a) Citrus fruit is more expensive to handle per unit of traffic than the average of all freight per unit of traffic;
>
> (b) The principal portions of the lines of the Baltimore & Ohio and the Pennsylvania used in transporting citrus fruit are more expensive to operate than their respective system lines as a whole; and

(c) The light-loading and other characteristics of the citrus traffic make the car-mile unit a more suitable and a more reliable basis than the only other unit suggested.

Accordingly, it will be seen that appellants have here followed the injunction of this Court in *Wood* v. *Vandalia R. R. Co.*, 231 U. S. 1, 6, 7, to the effect that before a cost unit may be used which is "found by bringing together a great variety of operations * * * and different outlays for different sorts of traffic," it would be necessary to have evidence either *"justifying the conclusion that the cost in proportion to the revenue was substantially the same for that part of the traffic as for the whole, or, if there were a material difference, satisfactorily showing its nature and extent."*

The theory of the studies presented by appellants is likewise supported by this Court's opinion in *Smyth* v. *Ames*, 169 U. S. 466, where the Court, in effect, held that the ratio of expense to earnings on the entire business of a railroad could be taken to show the cost of some particular item or class of traffic if, from the evidence, the conclusion is warranted that its cost in proportion to the revenue therefrom could be properly so expressed.

D. The Cost to Appellants of Transporting Florida Citrus Fruit Per Unit of Traffic is Greater than the Average Cost of Transporting all Freight Per Unit of Traffic on Their Respective Systems.

1. The Extraordinary Nature of the Many Special Services Accorded Citrus Fruit Traffic Discloses Their Expensive Character.

The extraordinary nature of the many special services performed by appellants in respect of citrus fruit traffic in line-haul movement and at intermediate and destination terminals, and the unusual burden of expense to them in consequence of providing such services and the facilities necessary for the accommodation of this traffic, are outlined with appropriate record references at pages 40-52 and in Appendix D to the original brief for appellants, pages 161-170. These essential facts are not controverted, and it will serve no useful purpose to reiterate them here. It will suffice to note a few of such items as illustrative.

Citrus fruit moves in refrigerator cars, which are heavier than cars used in the handling of dead freight. Their use entails a rental expense of 2 cents per mile, both loaded and empty. Because of the nature of the commodity, this traffic requires inspections and special services in addition to the usual inspections and services given to ordinary cars and it must be and is given more expeditious handling both on the road and in the terminals than the average of all freight. Marketing conditions incident to the handling of citrus fruit at destination require the maintenance and operation of expensive produce terminals which entail a relatively heavier terminal expense than obtains on the average of all traffic. Special

studies of partial costs of handling citrus fruit at perishable terminals showed per car expense of $21.18, $16.05, and $29.60 at Philadelphia, Pittsburgh, and New York, respectively (R. 869-86, 1118-42). Shipments of citrus fruit are more frequently diverted and reconsigned, are held at intermediate and destination terminals for reconsignment to a greater extent, and are subject to heavier damage claims than the average of all traffic. Because of the expedited movement necessary for citrus fruit, the carriers are required to have available in the terminals, both intermediate and final, more employes for the purposes of inspection, repairs, taking records, etc., than would be necessary except for such expeditious handling. The demands of this traffic necessitate the provision of extra engines and crews to facilitate prompt classification, switching cars to ice houses and to repair tracks, to make reconsignments, and to make up trains, and for the prompt movement of trains after they are made up. There is an unusually heavy return of empty cars which makes it difficult to secure a balanced movement in both directions, and which frequently requires the operation of locomotives without cars in one direction or the other.

2. The Commission in This Very Case Found that the Transportation of Citrus Fruit was More Costly than the "Ordinary Run of Freight."

In its decision in this case the Commission epitomized the more outstanding services performed by appellants in transporting citrus fruit which were not performed in the transportation of "dead freight"

(R. 58-59). It was in the light of this evidence that the Commission found that citrus fruit "is given a specialized, expedited service which is undoubtedly more expensive than the ordinary run of freight * * *" (R. 73).

3. Southern Lines, Appellees, Concede the Correctness of the General Conclusion that Citrus Fruit is More Costly to Transport than the "Ordinary Run of Freight."

The lower court found that Southern lines "conceded the correctness" of the general conclusion that citrus fruit is more expensive to transport than the ordinary run of freight and appellees have not disputed this finding (R. 248).

4. The Opinion of the Court Below Shows that it Accepted the General Thesis that Citrus Fruit is More Expensive to Handle than the Average or General Run of Freight Traffic.

In its opinion in this case, under the heading "Evidence of the Northern lines," the court below referred to the Commission's finding quoted under heading "2" above. It also noted the admission by Southern lines, under heading "3" above, as to the correctness of the general conclusion that citrus fruit is more expensive to transport than the ordinary run of freight, and it then proceeds to narrate the many elements of service "making for higher costs" on citrus fruit (R. 248-9). The court found that the "expedited service accorded citrus fruit" is one of the "most important elements making for higher costs"; that "the dispatch required by the expedited schedules" likewise increases the cost at intermediate terminals; and that "a large element of the costs con-

sists in the investment in destination terminals, a fact to be contrasted with the maintenance of private sidings at private expense for ordinary industrial freight." It likewise found that "a large amount of switching makes the yard cost higher than the average" (R. 249-50).

5. Transportation Experts with Years of Railroad Operating Experience Gave it as Their Informed Opinion and Judgment that Citrus Fruit is More Expensive to Handle Per Unit than the Average of All Freight Traffic.

Experienced transportation experts for Northern lines, each familiar with his own railroad, testified in detail as to the nature of the service accorded citrus fruit traffic.[1] Based upon the facts of transportation, they individually testified that the cost of transporting citrus fruit was greater than—

"the average for all other traffic" (Fell, R. 1207);
"the average of handling all freight" (Coverston, R. 1278);
"the handling of the general run of traffic" (Barbour, R. 1315);
"the average traffic generally on the system" (Menaugh, R. 1344);
"the cost of handling all traffic" (McSweeney, R. 1367-68);
"the cost of handling all freight" (Ward, R. 1370);
"other traffic" (Bell, R. 1375); and
"the average of all traffic" (Teal, R. 1377).

[1] This testimony is summarized at pages 49-52 and pages 161-70 of appellants' original brief.

For the foregoing reasons appellants respectfully insist that the first premise upon which they rely to support their use of a system unit of cost is unquestionably established.

E. The Principal Portions of Appellants' Lines Used in the Transportation of Florida Citrus Fruit are Shown by the Evidence to be Relatively More Expensive to Operate than Their Respective System Lines.

1. The Commission Has Said, in Effect, that Where the Particular Circumstances and Conditions Which Surround the Movement of Traffic over a Particular Portion of a Railroad System are Conceded or Proven to be Such as to Make Transportation Thereover More Expensive than for the System Generally, System Unit Costs May be Used to Establish a Cost Less than Actual Cost.

> "* * * Ordinarily it would be unsound to use a system unit cost to determine the cost in a particular State, but since it is indisputable that unit costs are higher in Florida than elsewhere on the system, it seems clear that system unit costs may be used to find a cost that may be said to be less than the cost in Florida."
>
> *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, 184.

2. Testimony of Responsible and Experienced Operating Officials of Northern Lines Establishes that Their Principal Routes for Citrus Traffic are Relatively More Expensive to Operate than Their Respective System Lines.

Operating and transportation experts of Northern lines testified as to the physical conditions which affect operation such as bridges, grades, tunnels, com-

plex intermediate and destination terminals, heavy passenger train density, and other impediments to or obstacles in the way of the prompt and economical movement of traffic. Their testimony was to the effect that operating conditions on those portions of Northern lines principally used in the transportation and handling of citrus fruit are more adverse and onerous than is the case on their respective system lines as a whole, and that the costs of handling all traffic per unit over such portions of their lines are higher than their respective system unit costs. This testimony covered all the principal routes north of the gateways. It is summarized at pages 171-185 of appellants' original brief.

3. Actual Operating Expenses Per Total Freight Car-Mile Show the Principal Citrus-Carrying Routes of the Baltimore & Ohio and the Pennsylvania to be Relatively More Expensive to Operate than Their Respective System Lines.

The bulk of the citrus fruit traffic transported by the Baltimore & Ohio and the Pennsylvania during a test period covering one season's movement utilized those portions of the lines of these carriers extending from Potomac Yard, Va., to Baltimore, Philadelphia, and New York (R. 255-56). Those portions of the Baltimore & Ohio and Pennsylvania systems are respectively parts of the Baltimore Division (B. & O.) and Eastern Region-New York Zone (P. R. R.). The table below, therefore, contrasts the net operating expense per total freight car mile for the Baltimore Division of the Baltimore & Ohio with its similar system unit, and for the Pennsylvania's Eastern Region and New York Zone combined with that carrier's similar system unit:

COMPARISON OF EXPENSES PER TOTAL FREIGHT CAR-MILE FOR 1929.

Baltimore & Ohio Railroad	Cents
System	10.56
Baltimore Division*	14.61
Pennsylvania Railroad	
System	10.95
Eastern Region—New York Zone (P. R. R. portion)†	11.59

Authority: Bonn's Ex. No. B-1; Clark's Ex. No. C-1.

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*The Baltimore Division of the Baltimore & Ohio extends from Brunswick, Md., through Washington, D. C., and Baltimore to Park Junction (Philadelphia) (Bonn's Ex. No. B-1).

†The combined Eastern Region and New York Zone (P.R.R. portion) of the Pennsylvania embraces system lines east of Altoona, Pa., and Renovo, Pa., except the Long Island Railroad (Clark Ex. No. C-1).

In addition, a check of the *transportation* costs for those divisions of the Pennsylvania which more particularly lie along the route of movement from Potomac Yard through Baltimore and Philadelphia to New York shows that for these divisions the *net transportation expenses alone were 14.2 cents* per total car-mile as compared with the total car-mile expenses of 11.59 cents for the Eastern Region and New York Zone (P. R. R. portion) combined, and of 10.95 cents for the system. The two latter figures represent full costs and not merely transportation expenses only.

The foregoing facts demonstrate the soundness of the second premise relied upon by appellants to support their use of a system unit of cost.

F. For the Light-Loading Citrus Fruit Traffic Requiring Expedited Transportation and Many Special Services the Average Total Car-Mile Expense Unit Here Furnishes a Reasonable Basis of Approximating the Cost of Handling Citrus Fruit, Although Less than the Actual Cost to Appellants.

Of the two methods of approximating cost suggested of record, viz., the total car-mile and the gross ton-mile, the former is the more reliable. The use of the car-mile unit assumes that the total average expense per mile of hauling and handling a *car* of citrus fruit and returning it empty is at least as great as the expense per mile of hauling and handling the average car of freight on the same railroad, including the return of the empty. The gross ton-mile unit assumes that the expense per mile of hauling and handling a *ton* of citrus fruit and car, including the return empty movement, is at least as great as the expense on the same railroad of hauling and handling the average ton of all freight and cars used in its transportation, including the return empty movement of such cars.

Operating officials of Northern lines testified that the actual methods of operation incident to the transportation of citrus fruit made the car-mile unit more suitable and more reliable than the gross ton-mile unit. Among other reasons which they advanced were the light-loading of citrus fruit, the expeditious handling of that traffic, the fact that in the operation of a railroad the car is the unit, etc. The separate expressions of these experienced officials on this subject were reproduced at pages 187 to 192 of appel-

lants' original brief. Not one operating official of a Southern line expressed a contrary opinion, and accounting officers for Southern lines conceded that because of its relatively light loading the gross ton-mile basis would *understate* the expense of handling citrus fruit for either the Eastern or the Southern lines (R. 1418).

The court below, in referring to the use of the system gross ton-mile unit for estimating the cost of handling citrus fruit, said:

> "It was generally agreed that if the latter method were employed, the cost of carrying a light commodity like citrus fruit in expedited service would be underestimated since the gross ton mile basis apportions an unduly large share of the aggregate system expense to heavier classes of traffic such as coal which are in fact cheaper to carry" (R. 248).

And further:

> "* * * it is probable when the light loading and expedited service of citrus fruit are considered, that costs measured on the average gross ton mile basis would not be as great as the cost of carrying citrus fruit" (R. 257).

An experienced transportation engineer testified that it requires approximately the same, or a greater amount of, energy to move a carload of lightly-loaded traffic at high speed as a car of heavily-loaded traffic at slow speed (R. 1381-82); that transportation expenses (superintendence and dispatching of trains, station employees, signals, clearing wrecks, loss and damage, etc.) are more properly distributed on a per car basis than on a tonnage basis (R. 1382-

83); and that maintenance of way and maintenance of equipment expenses are likewise more accurately distributed on a per car basis than on a tonnage basis (R. 1382-83).

As illustrative of the fairness of using the total car-mile expense unit appellants refer to the situation of the R. F. & P.

In a normal year the R. F. & P.'s citrus and other perishable traffic will equal the number of cars of all other traffic (R. 1342). All its perishable traffic gets "identical service" (R. 1340). In the light of the many special services given perishable traffic as compared with other non-perishable traffic the Superintendent of Transportation of the R. F. & P.—a man of 35 years' railroad operating experience—gave it as his informed judgment that the cost of handling citrus and other perishables was higher than for the remainder of all freight handled by the R. F. & P. (R. 1340). *This testimony stands uncontradicted of record.* Obviously, if the cost of handling perishables (50 per cent of the R. F. & P.'s traffic) is more than the remaining 50 per cent (all traffic) it is entirely fair to use the average total car-mile cost of the R. F. & P. on all its traffic to determine a cost which must necessarily be somewhat less than the total car-mile cost of handling citrus fruit. A similar conclusion necessarily follows in the case of other carriers whose proportion of "dead freight" handled at slow, economical speeds is even greater than that of the R. F. & P.

The justification for the use of the total car-mile expense unit is dealt with in greater detail at pages 57-62 of appellants' original brief. The record clearly establishes that the use of this system unit

provides a reasonable basis for approximating the cost of handling citrus fruit in expedited freight service.

G. The Prescribed Divisions Likewise Violate the Provisions of Section 15(6) of the Interstate Commerce Act Which Requires the Commission to Give due Consideration to the Amount of Revenue Required to Pay Operating Expenses, Taxes, and a Fair Return on the Property Used in the Service.

Section 15(6) of the Interstate Commerce Act requires that the Commission, in prescribing "just, reasonable, and equitable" divisions, shall, among other things, give due consideration to "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation."

This requirement imposes upon the Commission a duty to balance and appraise the amount of revenue required to pay the operating expenses, taxes, and a fair return on the properties of *both* sets of carriers. In the studies presented it appears that both for particular hauls and in the aggregate *the estimated expenses to appellants* (including operating expenses, car rental, and a reasonable allowance for taxes, but with no allowance for return on investment) *exceed the gross revenues per car,* and in the aggregate, which they would receive under the prescribed divisions. On the other hand, the same exhibits show that the *Southern lines,* after allowing for the same character of expenses, will receive amounts available for return on investment far in

excess of a minimum fair return. Thus Hodkinson's Exhibit No. C-19 shows that tested by his car-mile study the prescribed divisions fail by substantial margins to afford any return whatever to the Pennsylvania or the R. F. & P.; that they afford a return of 4.42 per cent to the B. & O., and returns of *15.43* and *10.45* per cent, respectively, to the *A. C. L.* and the *S. A. L.* Typical of the situation is the following compilation showing the amounts available for return on investment for both Northern and Southern lines on shipments to six important destinations:

Difference Between Estimated Expenses and Gross Revenue Per Car From Prescribed Divisions.

	Available for return on investment			
	Northern lines		*Southern lines*	
	A.C.L. Origins	*S.A.L. Origins*	*A.C.L.*	*S.A.L.*
Altoona (P. R. R.)	$ 9.09*	$ 9.02*	$ 98.02	$ 91.32
Baltimore (P. R. R.)	18.69	18.60	98.72	89.55
Buffalo (P. R. R.)	26.07*	28.55*	106.15	95.78
New York (P. R. R.)	7.62*	7.75*	105.28	99.19
Philadelphia (B. & O.)	2.70	5.33	103.37	105.69
Pittsburgh (B. & O.)	10.24*	7.56*	100.51	98.15
(P. R. R.)	15.39*	14.98*	100.39	93.62

* Indicates deficiency under estimated expense per car.

NOTE A—"Estimated expense" includes operating expenses, car rental, and an allowance for taxes.

NOTE B—Amounts shown for Southern lines taken from Hodkinson Ex. No. 6-A, pages 2 and 4. Amounts for Northern lines taken from Hodkinson Exhibit No. 4.

It further appears that in the aggregate on the 17,324 cars included in the study, and using exactly the same formula for determining expenses for both Northern and Southern lines, appellants would receive *nothing whatever* for return on investment allocable to citrus fruit, but would have suffered an aggregate deficiency of $53,469.79 under the estimated expenses, while *Southern lines would have received* in the aggregate, as available for return on investment, a sum approximating $1,767,078.86 in excess of estimated expenses, plus car rental and a reasonable allowance for taxes, equivalent to a *12.95 per cent return on investment* "fairly attributable" to the handling of citrus fruit.

Under such circumstances appellants contend that *as to them* the Commission has ignored the specific requirement of the statute that in prescribing divisions it must give "due consideration," among other things, to the "fair return" on the railway property "held for and used in the service of transportation," and that the Commission has therefore exceeded its statutory powers and deprived appellants of their property without due process of law.

The Commission apparently takes the position that this "fair return" on railway property "held for and used in the service of transportation" means the fair return received by carriers from all their traffic on all their railway property. Appellants insist, however, as was more fully developed in connection with another issue at page 148 *et seq.* of their original brief, that, especially where a single commodity is involved, it is the fair return on the property *devoted or fairly attributable* to the transportation of that commodity that should constitute the criterion. In *Beau-*

mont, S. L. & W. Ry. Co. vs. *United States,* 282 U. S. 74, this Court said at page 89:

> "There is no allegation in the complaint, or evidence in the record to show, that any division to any of the appellants will not yield operating expenses chargeable to the service covered by it *plus a reasonable return on property value fairly attributable to that service.*" (Emphasis supplied.)

In the instant case appellants have shown that the revenues which accrue to them under the prescribed divisions will not for particular hauls, for individual lines, or in the aggregate, yield operating expenses reasonably chargeable to those individual hauls, to those individual lines, or to the aggregate service, and that there is *absolutely nothing* left for return on property value "fairly attributable" to the service which they perform in transporting citrus fruit.

H. Studies Based on the System Cost Per Gross Ton-Mile, a Unit Which Defendant Southern Lines Admitted and the Court Below Found Would Understate the Cost of Handling Citrus Fruit, Establish the Fact of Confiscation as to the Two Principal Appellant Lines.

In addition to the total car mile studies, appellants presented other studies using the gross ton mile expense unit (R. 1324-26). These studies cover the same 17,324 cars as were covered by the total car-mile studies. The following table shows the results

for the three principal Northern lines (appellants), and the two principal Southern lines:

Railroad	Amount Required to Produce a 5¾% Return	Net Income	Per Cent of Return
Pennsylvania	$153,914	$51,073	1.91
B. & O.	15,017	24,958	9.56
R. F. & P.	77,550	15,967*	none
A. C. L.	$425,505	$999,883	13.51
Seaboard	370,842	698,904	10.84

* Deficit.

The 5¾ per cent return shown in the foregoing table is based on the investment of the respective carriers in road and equipment, which investment has been used by both sides to the controversy and by the Commission throughout this proceeding. The portion of the investment allocated to freight was determined by the ratio that the net operating expenses for freight bore to the total operating expenses (R. 1234).

Southern lines admitted that "* * * the gross ton-mile basis does not truly reflect either for the Southern lines or for the Eastern lines, on the system average, the cost of handling the traffic" (R. 1418), and the court below found "it was generally agreed" that in using the gross ton-mile method, "the cost of carrying a light commodity like citrus fruit in expedited service would be underestimated" (R. 248), and that "costs measured on the average gross ton mile" would probably "not be as great as the cost of carrying citrus fruit" (R. 257).

In Kennedy's Exhibit No. 1, Southern lines presented a study covering the same 17,324 cars to Trunk

Line territory as were included in the Hodkinson studies. This study was based on the gross ton mile unit. In computing this unit certain selected operating expenses for coal and ore wharves, grain elevators, etc., were eliminated (because such facilities are not used in the transportation of citrus fruit), but without eliminating the gross ton miles attributable to such expenses. Since the expenses are divided by the gross ton miles to determine the expense per gross ton mile, such failure to eliminate leaves the divisor too large and produces too small a quotient. It is, of course, impossible to determine the number of car miles made by grain, or any other traffic, without a special study (R. 1326-27). It follows that the study submitted by Southern lines *substantially underestimates the cost of handling citrus fruits*, but even so, the study shows that but $95,219 and $66,239 were available for return on investment for the Pennsylvania and the R. F. & P. (R. 1545-46), substantially less than enough for fair returns.

II.

THE METHODS PURSUED BY THE COURT BELOW IN REJECTING APPELLANTS' ESTIMATES OF COST ARE FUNDAMENTALLY ERRONEOUS AND CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.

The court below apparently agrees that appellants' cost of handling citrus fruit is greater than the cost of handling the average or general run of traffic. It refers, for example, to the Commission's finding that citrus fruit, like other perishable traffic, is given a specialized, expedited service which is undoubtedly more expensive than the ordinary run of freight (R. 248). It also notes the fact that counsel for the Southern lines "conceded the correctness of this general conclusion" and then proceeds to summarize the many elements of service "making for higher costs" on citrus fruit (R. 248-9). The court found, among other things (R. 249-50)—

> (a) that the "expedited service accorded citrus fruit" is one of the "most important elements making for higher costs";
>
> (b) that "the dispatch required by the expedited schedules" likewise increases the cost at intermediate terminals;
>
> (c) that "a large element of the costs consists in the investment in destination terminals, a fact to be contrasted with the maintenance of private sidings at private expense for ordinary industrial freight"; and
>
> (d) that "a large amount of switching makes the yard cost higher than the average."

Having reached these conclusions, it is pertinent to inquire as to the reasons advanced by the court in rejecting appellants' estimates of cost. While the court below made no separate findings of fact, an analysis of its opinion under the heading "Conclusions on the Issue of Confiscation" (R. 258-60) establishes that the court failed to give weight to appellants' estimates of cost because of its reliance upon three assumptions or presumptions, none of which are supported by the facts of record.

A. The Court's Assumption that the "Wholesale" Handling of Citrus Fruit by the Pennsylvania and the Baltimore & Ohio Tends to Diminish Cost is not Supported by the Facts.

The first assumption relied upon by the court in rejecting appellants' use of the total car-mile expense basis in determining costs, was the fact that the principal appellants "dealt with" the transportation of citrus fruit in "wholesale rather than in retail quantities." Southern lines had shown that the Pennsylvania seldom received less than 50 cars per day at Potomac Yard, and often as many as 200 cars per day, and the court stated that the Pennsylvania "invariably operated one, and sometimes two, solid trains of perishable commodities per day" (R. 256). Of course, it will be remembered that whatever the volume of citrus fruit received by the Pennsylvania it was all received from the two principal appellee Southern lines, and after they had enjoyed an average weighted haul in excess of 800 miles.

The court's statement as to the operation of "solid trains of perishables" is substantially true as to New

York, but it gives an incorrect impression of the situation in its entirety. With few exceptions, the New York market is the only market which will take perishables in solid train loads (R. 1361). During the peak season one of the New York trains would run virtually solid cars of perishables a substantial portion of the time, but this does not apply to all the trains operated from Potomac Yard to New York which carry perishables on the same day. During the season of 1928-29, when the perishable movement was at its height, only 13 per cent of the arranged freight service trains operated out of Potomac Yard were solid perishable trains, and in 1933 only 5 per cent of such trains were loaded solid with perishables (R. 1361).

But conceding that large quantities of perishables are received at Potomac Yard by the Pennsylvania daily during the height of the shipping season, does this constitute a valid reason for the rejection by the court of the specific evidence as to the more costly nature of the citrus traffic and the substitution therefor of an "assumption" that the "wholesale" handling of citrus fruit by the Pennsylvania tends to diminish the cost below that of handling average system traffic? Appellants insist that it does not for the following reasons:

First, because of grade conditions a locomotive hauling citrus fruit and other perishables out of Potomac Yard northbound is rated at but 2640 adjusted tons (50 cars), while "the same locomotive in other districts of the eastern region and also on the system is rated as high as 9000 adjusted tons." (R. 1358). The term "adjusted tons" is used by the operating departments of railroads to determine a po-

tential trainload. Because of grade conditions an arbitrary tonnage factor is added to the gross weight of each car in establishing a trainload for a locomotive. That factor on business northbound from Potomac Yard is 5 tons per car (R. 1358).

Second, for a 5200-ton (100-car) train, Washington to New York, two engines, two crews, etc., are required from Potomac Yard to Baltimore, whereas from Philadelphia to Pittsburgh one engine of the same type could handle a 5200-ton train as far as Altoona, Pa., and after being helped over the mountains, could continue alone with the train on to Pittsburgh (R. 1358-59).

Third, tonnages of the perishable trains out of Potomac Yard on the Baltimore & Ohio are cut by from 800 to 900 tons per train (R. 1371). In other words, trains with dead freight handle that much more tonnage. Tests made in 1933 showed that Pennsylvania perishable trains out of Potomac Yard northbound were loaded to only 82 per cent of their potential engine ratings (R. 1396) over the sector from Potomac Yard to Baltimore. Leaving Baltimore the percentage is still lower. Witness Clark said (R. 1396):

> "* * * The rapid drop from 82.1 per cent to 59.2 per cent and 56.5 per cent as the trains proceed northward is explained by the fact * * * that trains carrying perishables must be loaded out of Potomac Yard to cover the grade conditions into Baltimore and then must not be stopped in their northward progress to fill out with other freight and they proceed with an engine capacity that is not then in use."

Fourth, a typical Pennsylvania perishable train out of Potomac Yard to New York carries only 1,085 tons of "pay" freight, but for each ton of freight 3.3 tons of tare weight must be hauled, whereas a typical freight train between the same points with no perishables or high class freight carries on an average 1,533 tons of "pay" freight and only 2.1 tons of tare weight per ton of freight (R. 1397).

Fifth, it is, of course, true that all the many special services accorded to citrus fruit traffic heretofore shown in detail apply whether 10 cars a day are received at Potomac Yard, or whether 200 cars are so received. The number of cars of citrus fruit and other perishables received at Potomac Yard varies widely from day to day. Nevertheless, facilities capable of handling the peak movement must be maintained at all times although this results in surplus capacity much of the time, and consequent greater expense than as if the traffic moved continually in steady volume (R. 660, 1348). On days when the volume of perishable freight is light, trains must nevertheless be operated on expedited schedules to meet the market requirements. This entails the movement of lightly loaded trains (R. 1352). On days when the traffic is heavy, it may be necessary to make return movement of engines without trains in order to balance power (R. 1339).

While a large volume of movement is generally regarded as permitting more economical operation, this is on the assumption that full loading of locomotives can thereby be attained. But where, as in the case of citrus traffic, the volume fluctuates widely from day to day, and market conditions demand deliveries by definite hours at specific terminals of all

cars tendered for movement thereto, there results not only a sacrifice of potential train loading on the road, but frequently, on days of heavier receipts, a material increase in terminal costs due to the necessary performance within a brief period of numerous special terminal services (R. 659, 1351-55).

Sixth, the court's statement that "Pennsylvania trains out of Potomac Yard, consisting of 50 per cent or more of perishable cars, were similar both in respect to the average number of cars per train and the average adjusted gross tons per train to the average of all Pennsylvania trains out of that yard and exceeded in these respects the average for the Pennsylvania System as a whole" is incorrect. This statement is based on Tassin Exhibit A submitted by Southern lines. Upon rebuttal appellants showed that this exhibit did not include all cars and, in addition, that in comparing tonnage of trains out of Potomac Yard with system train tonnages the comparison was of unlike things, viz., "adjusted tons" out of Potomac Yard with actual or flat tons for the system (R. 1537-38). Clark's Exhibit No. C-5 shows for a typical week on an actual tonnage basis, and including all trains, that the true comparison is as follows:

Pennsylvania Railroad

Gross tons per train—Potomac Yard	1,768
Gross tons per train—System (1929)	2,352
Cars per train—Potomac Yard	42
Cars per train—System	56

In addition Clark's Exhibit No. C-3 compares 202 typical perishable trains, where 98.5 per cent of the cars were perishable, with 213 other fast freight

trains moving out of Potomac Yard during the period November, 1928, to May, 1929, inclusive. This exhibit showed that the perishable trains averaged but 72 cars per train while the other trains averaged 90 cars per train (R. 1397).

Seventh. The Pennsylvania's perishable terminal where citrus fruit for the New York market is delivered is on Manhattan Island at Piers 27, 28, and 29, North River. To reach this terminal citrus fruit is brought into Harsimus Cove Yard, Jersey City, N. J., where detailed classification is made and the cars switched onto floats for movement to Piers 27-29. There at the expense of the delivering line the cars are unloaded and the fruit placed in the consignee's assigned space on the pier. The marine service incident to delivery at New York adds substantially to the difficulties of operation, particularly when receipts are heavy, and during the winter months when citrus fruit moves in volume. Special cost studies disclosed partial costs for the Harsimus Cove—Piers 27-29 terminal service to be *$29.60 per car* (R. 1353-56).

Finally we have the uncontradicted testimony of Messrs. Clark and Bonn *as to the actually higher unit costs* on those portions of the lines of the Pennsylvania and the Baltimore & Ohio between Potomac Yard and New York than on their respective system lines (*ante,* pp. 39-40).

It follows in the light of all this uncontradicted evidence as to the facts of operation that the assumption indulged in by the lower court based on the handling by the Pennsylvania of citrus fruit in "wholesale" quantities can not be justified, and its finding in this regard was unlawful and should be set aside.

B. The Court's Assumption That the Heavy Traffic Density of the Baltimore & Ohio and the Pennsylvania between Potomac Yard and New York Decreases the Cost Per Unit of Traffic Below Their Respective Average System Unit Costs is Unsound as Well as Contrary to the Facts.

The second reason advanced by the court for rejecting appellants' estimates of cost related to the "peculiar conditions generally applicable to the movement of freight on the Pennsylvania Railroad between Richmond and New York," by which is meant the heavy traffic density of the Pennsylvania between Potomac Yard and New York. In a prior part of its decision the court had concluded that—

> "* * * the effect of heavy traffic density is a reduction in the operating expense per unit of traffic for the reason that a large part of the operating expenses remain constant and unaffected by the volume of traffic, and hence as traffic increases the cost per unit decreases."

This finding was based on Exhibits Nos. K-5 to K-10 (Witness Knight), which showed that the traffic density on the chief citrus traffic routes of the Pennsylvania and the Baltimore & Ohio north of Potomac Yard was much greater than for the balance of their respective *system* lines. Principally from this fact the witness inferred that the costs of transportation on these routes of the Baltimore & Ohio and the Pennsylvania were less than for their respective systems. The court below erroneously adopted this inference. While such a conclusion might be sound

if a comparison is made one year with another for the same division or portion of a railroad, it is most emphatically and demonstrably unsound when the comparison is between one division or portion of a railroad having a heavy traffic density with a different division or portion of line of lighter traffic density, or with the system as a whole. For purposes of argument, this may be demonstrated by contrasting the Pennsylvania's line between Potomac Yard and New York with the double-track line of the same carrier between Baltimore and Harrisburg, Pa. The last-named line operates largely through a farming section, and passes through no large metropolitan areas. The Pennsylvania's line between Potomac Yard and New York is a two-to-six track line. It operates through a densely populated area and passes through large cities. Large expenditures have been made for grade crossing eliminations and for avoidance of congestion. For example, what is known as the Pennsylvania's freight high line over Philadelphia is a viaduct about three and one-half miles long. Between Philadelphia and New York the Pennsylvania has a four-track line for the entire distance, with stretches of six tracks (R. 663-66, 668, 672, 681, 1356-57). The nine Northern roads principally interested in the handling of citrus fruit in Trunk Line and New England territories have an average investment per mile of $199,239.00 as compared with an investment of but $76,669.00 per mile for five Southern roads (R. 1543). In addition, there are passenger train interferences, greater numbers of employees, higher maintenance costs, etc., all of which are factors bearing upon the question of cost of service. The expensive operations in and

around congested terminals are a vital factor. Now if it should be shown that the traffic density of the Pennsylvania's line between Potomac Yard and New York is five times as great as that of the line between Baltimore and Harrisburg, would that circumstance alone be determinative at all so far as relative unit costs on the two lines are concerned? It obviously would not, for the reason that *traffic density is only one element in the problem.* Greater traffic density does not therefore form a reliable basis for an assumption that unit costs are lower. Relative costs can only be determined by a consideration of all elements. The Commission has recognized in this very case that traffic density is only one element in the problem. It said (R. 83):

> "* * * that insofar as traffic density has an effect upon cost or burden of service, that effect must be reflected in the statistics showing results of operation."

The Commission has consistently found that *traffic density* by itself is not determinative on the question of relative costs because of other factors such as greater investment and more difficult or expensive operating conditions, and that so far as it has an effect on cost of service, that effect must be reflected in the statistics showing results of operation.

New England Divisions, 126 I. C. C. 579, 614;
Divisions of Freight Rates, 148 I. C. C. 457, 473; 156 I. C. C. 94, 100.

In a prior part of this brief (*ante,* pp. 39-40), appellants showed the unit car-mile cost of operation over the portions of the lines of the Baltimore & Ohio and the Pennsylvania principally used in the han-

dling of citrus fruit in contrast with the system unit figures. *These actual expense figures, which cover all elements of cost, including the effect of traffic density, show that the portions of the Baltimore & Ohio and the Pennsylvania used in transporting citrus fruit are more expensive to operate than their respective system lines.*

In addition, it should be pointed out that in the case of the Baltimore & Ohio and the Pennsylvania, the so-called Copeland density charts upon which the showing is based were for *1924* and *1927*, six years and three years, respectively, prior to the beginning of the movement here involved. Obviously they may not properly be relied upon for this later period unless they are shown to be typical. For the Baltimore & Ohio, based on the year 1924, Witness Knight testified that the freight density of the Baltimore & Ohio between Potomac Yard and Philadelphia, using revenue ton-miles as the measure of traffic density, was about 352 per cent of the balance of the system (R. 1520). The utter unreliability of such a showing as applied to the period in controversy is clearly established by the 1929 traffic density figures shown in Witness Bonn's Exhibit No. B-1, and by his testimony in connection therewith (R. 1392), from which the following table has been compiled:

Baltimore & Ohio	Miles of Road	Net ton miles	Net ton miles per mile of road	Per cent of System
System	5,658	22,179,733,000	3,920,066	100
Baltimore Division	497	2,215,171,800	4,457,086	113.7

In other words the traffic density as shown by revenue ton miles per mile of road in 1929 was only about

13.7 per cent higher on the Baltimore Division than for the system as a whole. From the same exhibit it may be readily computed that the net ton miles on the Baltimore Division constituted less than 10 per cent of the total net ton miles for the entire system, while the *net freight operating expenses* for the Baltimore Division constituted over *15 per cent* of the total net freight operating expenses for the system.

Appellants have convincingly shown by testimony of experienced operating men, as well as by statistical indices, that the principal routes used by Northern lines for the transportation of citrus fruit are more expensive to operate than their respective system lines. The Pennsylvania's Eastern Region—New York Zone costs, Clark's Exhibit No. C-1 and the Baltimore Division unit costs of the Baltimore & Ohio, Bonn's Exhibit No. B-1, (*ante*, pp. 39-40), were computed in exactly the same way as the system unit costs shown in Hodkinson's Exhibit No. 1. In this connection it is significant that although the Southern lines were furnished at the hearing with the primary accounts upon which the unit expense figures for the eastern sections of the Pennsylvania and of the Baltimore & Ohio were based, the Southern lines made no direct attack upon them.

As to these cost figures the court said (R. 257):

> "In reply to the statistical calculations offered by the petitioners, to which reference has already been made, to show that in fact the costs of transportation on these regions of the Pennsylvania and Baltimore & Ohio are heavier than on the respective systems as a whole, the defendants offered a report of the Pennsylvania Railroad

to its stockholders in 1929, which, comparing the eastern region and New York zone with the system as a whole, gave figures showing that on the regions in question, operations were equally or more favorable than on the system as a whole with regard to the total number of tons carried one mile, the gross tons per train, train speed, gross tons per train hour, total cars per train, and pounds of coal per 1,000 gross ton miles."

It is obvious, of course, that these data relate to matters of efficiency and not to matters of cost. Moreover, they are only *selected items* the effect of which is merged in the whole cost per total car mile. But as shown, *the costs are actually greater for the portions of these roads used for handling citrus traffic.* If defendants could have *directly* attacked these actual unit cost figures relied upon by appellants to show the actual costs of operation, in spite of greater traffic density and relative efficiency, they would have done so, since they were furnished with the underlying data at the hearing.

The actual statistics of operation given by responsible officials in charge of those operations, which were not and could not have been directly contradicted, unquestionably establish that the unit costs of operation between Washington, Philadelphia, and New York on the citrus-carrying lines north of Potomac Yard for all traffic handled are higher than *system* unit costs for all traffic. The greatly preponderating weight of this affirmative evidence may not be nullified and cast aside by reliance upon the assumption, indulged in by the court below, that because of greater traffic density on these portions of

appellants' lines, as compared with the traffic density of the systems as a whole, the unit cost of operation must be less than on the systems as a whole. *Such an assumption was clearly erroneous and in conflict with the facts established by the direct evidence as to actual cost of operation.*

C. The Fact that the Prescribed Divisions Accord Northern Lines Slightly Greater Revenues than They had Previously Accepted Creates no Presumption that Confiscation Has Not Been Shown, Nor Does the Statement of the Court that the Pennsylvania's Revenues as Settled would be Confiscatory on the Car-Mile Basis Create Any Such Presumption.

Here, as in the court below, the Commission and the Southern carriers have urged that the prescribed divisions are not confiscatory as to appellants because the latter for years prior to 1928 had accepted divisions, which in their aggregate effect, produced slightly lower revenues.

The court below apparently accepted this view and placed "very great emphasis" upon the historic fact that the Northern lines for a period of twenty years prior to November 9, 1928, when *Florida R. R. Commissioners* v. *A. & R. R. R. Co.* 144 I. C. C. 603 was decided, voluntarily accepted a return for their services in the aggregate less than the revenues which accrued to them under divisions prescribed by the Commission (R. 257). It found it "difficult to believe" that Northern lines "would have acquiesced in divisions actually confiscatory" (R. 259).

Of similar import is the conclusion of the court that tested by the car-mile expense basis used by ap-

pellants, the divisions as actually settled were themselves confiscatory, at least as to the Pennsylvania (R. 259-60).

That these conclusions are not warranted by the record, and are not valid in law will now be shown.

While it is a fact that the amounts of the divisions which appellants had accepted to *interior* Trunk Line and New England points were those originally named and designated by them, it is emphatically not a fact so far as the divisions to the port cities (New York, Philadelphia, Baltimore and Boston) are concerned. These *divisions* were compelled by the same water competition which admittedly depressed the all-rail *rates* to those ports (R. 556, 891). This is corroborated by the Commission's decision in *Railroad Commission of Florida* vs. *Savannah, F. & W. R. Co., et al.*, 3 I.C.C. 688, decided October 29, 1891, where the Commission found that the all-rail routes had to meet "sharp competition" of the rail and water routes operating through Jacksonville, Savannah, and Norfolk (R. 555). As a result of these competitive influences the Northern lines were forced to accept factors in dividing rates to North Atlantic port cities materially below their normal basis and the 1908-10 agreement perpetuated these subnormal factors.

In prescribing divisions in this case the Commission slightly increased Northern lines' depressed divisions to New York and other port cities, and then reduced all divisions to interior points in Trunk Line and Central territories points to the same relative level. This accounts for the very drastic reductions made at such interior points as Altoona, Buffalo, and Pittsburgh.

Subsequent to the establishment of the old basis of divisions, following the prescription of citrus fruit rates in 1908, and during the succeeding twenty years conditions changed so completely as to negative any possible presumption in fact or in law that appellants' divisions were not confiscatory in 1928.

Gradual but important changes in the relative costs of operation in Official and Southern territories occurred during this period. These were recognized by the Commission's approval of relatively greater measures of general increase in rates for Official than for Southern territory. Thus, for Official lines, the general increases of 5 per cent in 1915, of 15 per cent in 1917, of 25 per cent in 1918, and of 40 per cent in 1920, and the general reduction of 10 per cent in 1922, represented governmental recognition of Official lines' need for a cumulative general increase in rates of 90 per cent during the period from 1915 to 1922, while the two general increases of 25 per cent each in 1918 and 1920, and the 10 per cent reduction of 1922, authorized for Southern territory recognized their need for a cumulative increase in rates of only 40 per cent over the same period.

Nevertheless, despite their active protests and claims, Northern lines could only secure a total of 50 per cent increase in their divisions over the period, while Southern lines secured the same percentage of increase.

In addition to the generally increased costs of operation in Official territory over the period mentioned, there were large outlays by Northern delivering lines for special terminal facilities for perishable traffic, and added expenses incurred by them in the performance of new services in respect of such

traffic, which represented an increased expense of handling citrus fruit without any increase in revenue.

The record shows that from 1915 on, the Northern lines had expressed dissatisfaction with their divisions because of their failure to reflect the proper measure of general increases. Sixteen years ago they registered this dissatisfaction (R. 564-5). In 1921, they complained informally to the Commission but were advised that it was not disposed to consider informally the question of these divisions (R. 565). In its original report the Commission recognized this situation in the following quotation (R. 72):

> "* * * Defendants had urged for some time, however, that their citrus-fruit divisions should have been increased at the time of the 5 and 15 per cent rate increases in Official territory in 1915 and 1918, even though the rates themselves were not affected, and that at the time of the rate increase of 1920, the Northern divisions should have been increased 40 per cent instead of 33 1/3 percent."

The fact that at their first opportunity after the new citrus fruit rates had been prescribed, appellants retained increased divisions is in itself proof of the sincerity of their belief as to the confiscatory character of their former divisions, and furnishes a complete counter-presumption.

Moreover, the action of the Commission in increasing appellants' divisions in the aggregate over those accruing under the earlier agreed basis also furnishes cogent evidence that the latter were in fact confiscatory as to them. The trouble is the Commission did not go far enough.

The court below lost sight of the fact that, as shown by Hodkinson Exhibit No. 10, of the 17,324 cars to destinations on the Pennsylvania and Baltimore & Ohio included in the Hodkinson studies, 16,965 moved to the three Northern ports of New York, Philadelphia and Baltimore, where Northern lines' divisions had long been depressed by water competition as already shown. The conversion by appellants of their old per box divisions to amounts per 100 pounds by use of the 80-pound factor, though producing some increases, left the divisions to these port cities depressed as before. As was the case with the Commission, appellants did not go far enough. While the fact is that to the points reached by single-line hauls of either the Pennsylvania or the Baltimore & Ohio north of Potomac Yard the average reduction in the revenues as settled, which was effected by the prescribed basis of divisions, was only $4.34 per car (R. 1257), on the remaining 7,059 cars moving to destination in Trunk Line and New England territories for multiple-line hauls, the total reduction amounted to $221,192.93 (Hodkinson Ex. No. 2-A, p. 124), or an average reduction of $31.33 per car (R. 1257). Since the cost studies were confined to the cars that moved for single-line hauls over the Pennsylvania and the Baltimore & Ohio, the mere circumstance that the total expenses charged against these particular cars on the car-mile basis were only about $30,000 less than the revenues as settled should, contrary to the conclusion of the court below, be given no weight against appellants' claim of confiscation.

From the above it clearly appears that the facts of record, instead of permitting an inference of acquiescence by Northern lines as to the non-confiscatory character of their citrus divisions, com-

pel the conclusion that *appellants on every appropriate occasion emphatically registered their views as to their unreasonably low character.*

Further, Northern lines have never agreed that the provisional basis of divisions employed by them in respect of the prescribed rates was sufficient to avoid confiscation. They have always been of the belief that any fair basis of division would accord them greater revenues, and they intended their employment of the provisional basis merely to bridge the gap pending determination, by agreement or lawful Commission action, of a permanent basis of divisions.

Presumptions against the confiscatory character of the prescribed divisions, or of the old divisions, or the divisions as settled on the provisional basis, can have no weight or effect against clear proof of the fact of confiscation. And appellants respectfully submit that their proof sufficiently meets the burden imposed upon them by the law and is completely ample to establish that the prescribed divisions are confiscatory.

In passing, it is to be remembered that where, as here, the rates to be divided are not themselves confiscatory, *no amount of prior acquiescence in confiscatory divisions could suffice to bar a carrier from claiming or proving its constitutional and statutory rights to reasonable, equitable, and non-confiscatory divisions for prospective application when that issue is presented for determination. Nor could the Commission or a court deny to such a carrier its constitutional and statutory rights in this respect, because of such alleged acquiescence.*

The lower court seems not to have appreciated how frequently carriers, for competitive or other reasons,

maintain rates which could not be prescribed by regulatory authority and which, if tested by constitutional standards, might in a proper proceeding be claimed to be confiscatory. Railroad rates are not customarily made with particular reference to cost, but according to the value of the service—sometimes referred to as "what the traffic will bear." It, therefore, results that in many instances, as, for example, in the case of water competition, rail carriers will maintain rates which do not yield full cost, but only something toward general expenses over and above out-of-pocket costs. The Commission's reports are full of such cases.[1] But the Commission has consistently recognized that it may not compel the carriers to establish rates in such low bases[2], and the courts have confirmed this view.[3]

Appellants respectfully insist that the methods which the lower court pursued in rejecting their estimates of cost were fundamentally erroneous and that they constitute a denial of due process of law. Under the principle announced by this Court in *West.* v. *Chesapeake & P. Tel. Co.*, 296 U. S. 662, 79 L. Ed. 948, and in *Chicago, Etc. Ry. Co.* v. *Public Utilities Comm.*, 274 U. S. 344, the decision of the court below must be reversed. Here, as in the last named case, the Court refused to consider and give weight to persuasive evidence because of a reliance upon matters which could not legally affect its judgment. This clearly violates the principle of due process.

[1] Typical of these is *Export and Import Rates*, 169 I.C.C. 13, 53-57 (1930).

[2] See, for example, *Southern Class Rate Investigation*, 100 I.C.C. 513, 611.

[3] *I.C.C.* v. *Union Pacific R.R.*, 222 U. S. 541; *Southern Pacific Co.* v. *I.C.C.* 219 U. S. 433, 441, 449; *Louisville & Nashville Railroad Co.* v. *United States*, 238 U. S. 1, 11, 12, 13. See also *Atchison, Topeka & Santa Fe Ry. Co.* v. *Interstate Commerce Commission*, 190 Fed. 591, 592, 594, 595.

III.

THE GROUNDS ADVANCED BY APPELLEES AGAINST THE RELIABILITY OF APPELLANTS' ESTIMATES OF COST DO NOT AFFECT THEIR VALIDITY.

At pages 49 to 108 of the Government's original brief various grounds are advanced as to why the estimates of cost presented by appellants are untrustworthy. Before discussing, very briefly, the various points there made, appellants invite this Court's attention to a principle heretofore enunciated by the Commission to the general effect that cost studies are not to be disregarded because they may not be correct in every detail and are based in part on estimate, *especially when they have not been impeached in any essential particular by anything in the record.*

> *Increased Switching Charges At Detroit*, 91 I.C.C. 82, 96;
> *Switching at Kansas City*, 96 I.C.C. 538, 555.

While the cases referred to involved cost studies of switching movements where it was possible to make fairly direct studies based on observation of actual movements, the principle is none the less sound in a case such as this where appellants have made a serious attempt to establish approximate cost in the only practicable way open to them.

A. There is No Merit in the Criticism That There is No Separation Between Line-Haul and Terminal Costs in the System Cost Unit Used by Appellants, and that Pyramiding of the Terminal Factor Results.

This criticism is one of three made by the Commission in another case, *Burch* v. *Railway Express Agency*, 190 I.C.C. 520, where the factual situation was entirely different from that in the instant case. Since the average hauls on citrus traffic in official territory closely approximate the average hauls on all traffic, *there is no occasion* for making a separation between line haul and terminal and there is no pyramiding or duplication of terminal costs. Southern lines conceded that there is no pyramiding of terminal costs "if the average haul of the citrus traffic approximates the average haul of all traffic" (R. 1215-16). The following table contrasts the average hauls on citrus traffic (Hodkinson Ex. No. C-15) with the average haul on all traffic for the three principal appellants:

	Average Haul (Miles) Citrus Fruit	All Traffic
Pennsylvania	220.75	210.17
Baltimore & Ohio	112.81	190
R. F. & P.	110	97

It will thus be seen that the average hauls of the Pennsylvania and the R. F. & P. on citrus fruit are substantially the same as on all traffic while the average haul of citrus fruit on the Baltimore & Ohio is very much less than its average haul on all traffic. *Accounting witnesses for Southern lines conceded that*

for this reason even the system total car mile unit of expense would underestimate the cost of handling citrus fruit on the Baltimore & Ohio (R. 1430, 1463).

In the *Burch case, supra*, the combined loaded and empty movements ranged from 2170 to 2374 miles. The factual situation in the *Burch case* obviously is therefore entirely unlike that in the instant case where, as just shown, the average hauls on citrus traffic are substantially the same as on all traffic.

Appellants will now undertake to demonstrate mathematically just what this criticism as to pyramiding means as applied to an actual movement. At page 5 of Hodkinson's Exhibit No. 3-A the cost of handling a carload of citrus fruit from Richmond, Va., to Phillipsburg, N. J., is shown. Phillipsburg, N. J., is 209 miles from Potomac Yard, which is one mile less than the Pennsylvania's average haul on all traffic of 210 miles. The aggregate expense per car for the haul from Richmond to Phillipsburg is there shown as $76.84, divided $53.04 for the Pennsylvania's haul of 209 miles north of Potomac Yard and $23.80 for the 110 mile haul of the R. F. & P. from Richmond to Potomac Yard. The Pennsylvania's costs for this haul were as follows:

Table Showing Estimated Expense for Handling a Car of Citrus Fruit from Potomac Yard via P. R. R. to Phillipsburg, N. J.

	P. R. R.
Expense loaded haul (209 miles x 10.95445 cents)	$22.89
Expense empty haul (186 miles x 10.95445 cents)	20.38
Rental refrigerator car	7.90
Taxes	3.59
Total estimated cost	$54.76
Less ice haulage cost	1.72
Net cost	$53.04

Note. The foregoing table is reproduced from page 5 of Hodkinson's Exhibit No. 3-A. The loaded and empty haul costs are determined by using the actual loaded haul on citrus fruit moving to Phillipsburg, N. J., adding the system average percentage of empty refrigerator car movement attributable to the loaded movement, and multiplying by the system unit expense per car mile.

The loaded haul on citrus fruit in the above table is 1 mile less than the Pennsylvania's average loaded haul on all traffic, but the empty haul on citrus fruit is 186 miles while on all traffic it is but 58 per cent of the loaded movement, or 122 miles. In the next table, therefore, appellants have assumed the same ratio of empty to loaded movement for citrus fruit as in the case of *all traffic*. The table follows:

Table Showing Estimated Expense for Handling a Car of Citrus Fruit from Potomac Yard via P. R. R. to Phillipsburg, N. J., but Charging Against Citrus Fruit Only the Same Empty Return Movement as on All Traffic.

	P. R. R.
Expense loaded haul (209 miles x 10.95445)	$22.89*
Expense empty haul (121 miles x 10.95445)	13.25
Rental refrigerator car	7.90*
Taxes	3.59*
Total estimated cost	$47.63
Less ice haulage cost	1.72*
Net cost	$45.91

* From page 5, Hodkinson Exhibit No. 3-A.

The above estimated cost can not possibly be criticized on the ground that there is a pyramiding of the terminal factor because the loaded and empty hauls used for citrus fruit are in each instance 1 mile *less* than the loaded and empty hauls on all traffic, as is shown below:

	Average Haul P. R. R. Loaded (miles)	Empty (miles)
All traffic	210	122
Citrus fruit to Phillipsburg	209	121

In other words, the $45.91 cost above computed necessarily *understates* the cost of handling citrus fruit because the P. R. R. actually returned the empty car 186 miles instead of the 121 miles for which charge is made.

From the foregoing tables it may be easily computed that the difference between the allocated cost in the Hodkinson study, $53.04, and a cost determined by using as typical a loaded and empty haul substantially identical with that of all traffic, viz., $45.91, is $7.13. In other words, *if there is any pyramiding of the terminal factor it is bound to be included in this $7.13,* which is the sum that is included in the Hodkinson study for the additional empty haul of 65 miles on the citrus car over and above the empty haul on all traffic (186 miles in the first table minus 121 miles in the second). According to Witness Lamb for the Southern lines, about 36 per cent of the Pennsylvania's total freight expense is chargeable to terminals (R. 1430). Accepting this figure there would remain 64 per cent of $7.13 as representing the cost of the line haul. This percentage of $7.13 is $4.56, which is the amount, according to Witness Lamb's testimony, that would be properly charge-

able for the 65 miles additional empty return haul on citrus over and above the empty haul on all traffic as just indicated. If this amount is added to the $45.91 net cost shown in the second table heretofore reproduced, *an aggregate cost of $50.47 results.* By turning to page 1 of Hodkinson Exhibit No. 10, it will be seen that the *revenue* which accrues to the Pennsylvania Railroad on a shipment to Phillipsburg under the divisions prescribed by the Commission is *$49.97*. In other words, here we have a cost determined by using substantially the same loaded and empty haul as is performed in connection with all traffic, except that $4.56 is added to cover the line haul cost alone of hauling an empty refrigerator car 65 miles, yet the *aggregate cost, with no allowance for profit or interest on investment, exceeds the revenue* received by the Pennsylvania.

Let us take New York as an example, a destination as to which the Commission's attorneys in their brief in the lower court discoursed at length on the subject of the pyramiding of the terminal factor. The average per car expense charged in the Hodkinson study on 4,849 A. C. L. cars from Potomac Yard to New York is $59.88 for a loaded haul of 236 miles and an empty haul of 210 miles (See Hodkinson Exhibit No. 3-A, page 5). If in computing costs we allocate to these New York cars merely the $45.91 just shown for an average loaded and assumed empty haul on citrus fruit *the same as on all traffic,* we find that the Hodkinson studies include for the additional 27 miles of loaded haul to New York and the additional 89 miles of empty haul from New York the difference between $59.88 and $45.91, or $13.97. In other words, here again if there is any pyramiding of

the terminal factor it must be included in the $13.97, which, of course, also must cover the cost of the service for the additional 27 miles of loaded and 89 miles of empty haul previously referred to. Again taking Witness Lamb's 36 per cent of this excess of $13.97 as properly chargeable to terminal, the balance of $8.94 would remain to cover the 27 miles of loaded haul and 89 miles of empty haul over and above the average loaded and empty haul on all traffic, making *a total expense of* $45.91 plus $8.94, or *$54.85.* Turning to page 2 of Exhibit No. 10, we find that on the 4,849 Atlantic Coast Line cars which moved to New York the Pennsylvania's *revenue* under the divisions prescribed by the Commission amounted to $265,-138.79, or an average of *$54.68* per car. Here again we see that on a basis of cost which avoids any possibility of pyramiding the terminal *the aggregate cost, with no allowance for return on investment, exceeds the revenue.*

Let us now turn to the portion of the service performed by the R. F. & P., which on every car handled was 110 miles loaded, and 99 miles empty, haul. The expenses allocated to the citrus traffic in the Hodkinson study were:

Table Showing Estimated Expense for Handling a Car of Citrus Fruit from Richmond, Va., via R. F. & P. to Potomac Yard.

	R. F. & P.
Expense loaded haul (110 miles x 9.05994 cents)	$ 9.97
Expense empty haul (99 miles x 9.05994 cents)	8.97
Total operating expenses	$18.94
Car rental	4.18
Taxes	1.59
Total estimated cost	$24.71
Less cost ice haulage	.91
Net cost to R. F. & P.	$23.80

Authority: Hodkinson Exhibit No. 3-A, page 5.

The mere statement of the foregoing costs should be sufficient to show that they are very conservative. The $9.97 allocated as cost of hauling a loaded car 110 miles under conditions outlined by Witness Aiken, Superintendent of Transportation of the R. F. & P., is little more than a usual charge for switching. In the case of the R. F. & P. there can not possibly be any material pyramiding of terminal costs, because 75 per cent of all the R. F. & P.'s traffic is "overhead" or "bridge" traffic. This is convincingly shown in Hodkinson's Exhibit No. 8 and his testimony in connection therewith (R. 1291-93).

In the table below, however, we have computed a cost for the R. F. & P. on the assumption that each car of citrus traffic is hauled loaded for only the same distance as the average of all traffic, viz., 97 miles, and also that the empty haul of the R. F. & P. on citrus traffic is 69 per cent of the loaded, as shown by Mr. Lamb for all traffic, instead of 90 per cent as testified to by Witness Aiken.

Table Showing Estimated Expense for Handling a Car of Citrus Fruit from Richmond, Va., via R. F. & P. to Potomac Yard, but Assuming that the Car Is Handled for Exactly the Same Distances as in the Case of All Traffic.

	R. F. & P.
Expense loaded haul (97 miles x 9.05994 cents)	$ 8.78
Expense empty haul (67 miles x 9.05994 cents)	6.07
Car rental	4.18
Taxes	1.59
Total	$20.62
Less cost ice haulage	.91
Net cost	$19.71

The revenue that would be received by the R. F. & P. under the prescribed divisions on the car to Phillipsburg, N. J., to use the same illustration as in the case of the Pennsylvania, is $21.48 per car (page 1, Hodkinson Ex. No. 10), while on the 4,849 cars to New York the average revenue per car was about $21.40 per car (page 2, Ex. 10). In other words, if we utterly ignore the fact that the R. F. & P. performed 13 miles more of loaded haul and 30 miles more of empty haul than in the above computations which are based on the average loaded and empty hauls on all traffic, the R. F. & P.'s surplus over operating expenses and taxes would be the nominal amounts of $1.77 and $1.69 per car on the Phillipsburg and New York cars respectively.

In the light of the foregoing analysis there can not possibly be any reasonable doubt that the criticism as to pyramiding is not justified. As a matter of fact, on traffic moving for distances *less* than the average haul on all traffic, the estimated cost is bound to be

understated. Witness Kennedy, of the Southern lines, admitted on cross-examination that in the case of the Baltimore & Ohio, because of the short average haul on citrus fruit, *both the gross ton mile and the total car mile average unit expense as applied to the Baltimore & Ohio citrus traffic would have a tendency to understate the costs of handling its citrus fruit traffic* (R. 1463). Witness Lamb, of the Southern lines, made the same admission (R. 1430).

In the course of its opinion (R. 255), the court below, under the heading "Evidence Offered by the Defendants," stated:

> "* * * Pyramiding of terminal costs is illustrated in the application of the car mile unit cost to the movement of citrus fruit on the Pennsylvania in this year. The system average haul for the loaded and empty movement combined was 332 miles; while the average movement of citrus fruit was 416 miles, or an increase of more than 20%, involving an overstatement of terminal costs in the cost studies of this railroad. The freight expenses of the Pennsylvania, allocable to yards and terminals in 1929, amounted to $128,006,991, and when 20% of this figure is divided by the total car miles on the system, (2,741,963,000) there results the sum of .93c per car miles, by which the terminal costs have been overestimated. This figure, applied to the total Pennsylvania citrus fruit car miles in trunkline territory in the 1928-1929 season, (6,006,282), shows an overstatement of $55,858.42 in the aggregate cost as computed by the Pennsylvania for that territory."

It is apparent from this statement that the learned court below did not correctly appraise the extent to

which appellants' cost estimates met the Commission's criticisms in the *Burch case, supra,* or the extent to which any possible pyramiding of terminal costs had been avoided.

We believe we have herein already demonstrated by the use of hauls on citrus fruit identical with the hauls on all traffic, that there was not any pyramiding of terminal costs in appellants' estimates, certainly there was none to any such extent as was computed by the court below. That there would be no pyramiding of the terminal costs when average hauls were the same was admitted by counsel for Southern lines (*ante,* p. 71). Assuming, however, for the purpose of argument, that there is an overstatement of $55,-855.42 in the aggregate cost as computed by the Pennsylvania, as stated by the court in the above quotation, the *aggregate cost of the cars handled by the Pennsylvania would still exceed the revenues from the prescribed divisions by the sum of $6,617.35.* On the 15,782 cars included in the Pennsylvania study the total deficiency amounted to $62,475.77 (Hodkinson Ex. No. C-17).

The computations heretofore shown constitute an *unanswerable refutation* of the claim that the studies are untrustworthy because of pyramiding or duplication of the terminal portion of the car mile unit costs

B. The Claim that the Car-Mile Cost Theory is Faulty Because it Assumes the Cost of Hauling a Loaded Car One Mile to be the Same as That of Hauling an Empty Car the Same Distance is Not Supported by the Record.

Another criticism advanced by appellees, the United States and the Interstate Commerce Commission, against the car-mile cost estimates is that just stated in the heading. These appellees begin their argument of this point with the following observations:

> "Only slight knowledge of railway operation will enable one to realize that freight cars may be moved with less expense when they are empty than when they are under load. For example, they are handled in longer trains with a saving of wages and fuel, as well as maintenance of way, per car mile, in comparison with the loaded movement."

These statements sound very plausible, but record references are conspicuously absent. The statements are not supported by the record. On the contrary, the undisputed testimony of appellants' operating and transportation experts is to the effect that the expedited transportation accorded empty refrigerator cars, which are much heavier than the average car, make them just as expensive to handle as loaded cars (R. 1344, 1358). Moreover, an experienced transportation engineer testified that because of the difference in rolling friction between loaded and empty cars, tests which had been made show, for example, that it requires about double the amount of fuel and water to move a gross ton of empty coal car one mile

as a gross ton of loaded coal car one mile (R. 1386), because the empty car is handled at higher speed as compared with the slow economical movement of loaded coal cars. The effect of weight and speed on cost is shown by the testimony of this expert witness (R. 1376-1391), and it warrants the conclusion that the expense of handling empty refrigerator cars in the expedited return movement to the loading territory, is very little, if any, less than the per car-mile expense of handling all traffic the bulk of which is dead freight moving at slow, economical speeds. In other cases the Commission has recognized that the hauling of the car itself, without taking into account the load, is an important factor bearing upon cost.

Showers Bros. Co. v. *A. A. R. R. Co.*, 48 I. C. C. 518, 521;
Rates on Lumber and Lumber Products, 52 I. C. C. 598, 617;
Coal from the Crescent Districts to Detroit, Mich., 91 I. C. C. 194, 199.

It has also several times said that operating costs do not increase in proportion with increase in carloading *and that the increase in cost on this account is in fact relatively small.*

Ex-Lake Iron & Ore from Chicago to Granite City, Ill., 123 I. C. C. 503, 505;
Holmquist Lumber & Fuel Co. v. *C. & A. R. R. Co.*, 146 I. C. C. 491, 494.

In appellants' original brief, page 74, they pointed out that if it be assumed that it costs less to handle an empty than a loaded car, the obvious effect of applying an expense unit which includes the cost of han-

dling all loaded as well as all empty car miles is to understate the expense of the loaded haul and overstates the expense of the empty haul. Upon brief appellees, the United States and the Commission, concede this. They say:

> "* * * This is true when we are dealing with the aggregate of all traffic, but it is not true as to particular traffic unless the ratio of empty to loaded movement in the case of such traffic happens to be the same as that of all traffic."

Appellants invite attention to the tables (*ante*, pp. 73-79) where they demonstrate the confiscatory character of the prescribed divisions by the use of hauls, both loaded and empty, *which are the same as the average of all traffic.* In addition, of course, it must be borne in mind that the Commission itself has found that the specialized, expedited service performed by appellants in the transportation of citrus fruit is undoubtedly more expensive than the ordinary run of freight.

C. The Criticism That Appellant's Studies do Not Take into Account the "Composition of the Traffic" Handled by Appellants is Without Merit.

The arguments advanced by appellees on the subject of composition of traffic are mere speculations. The Commission, on brief, has construed its statement as to the more expensive character of the service performed by appellants in handling citrus traffic than on the ordinary run of freight as follows:

> "* * * the effect of the statement merely is that, like all perishable traffic, citrus fruit requires transportation service somewhat more expensive

> than that performed on non-perishable or what is sometimes termed 'dead freight,' assuming an equality of conditions other than the character of the commodities compared."

Since in 1929, 60.71 per cent of the Pennsylvania's total tonnage consisted of products of mines—"dead freight"—(R. 1425-26), this criticism advanced by the Government, if valid, would mean that it costs the Pennsylvania more to handle a carload of coal for an equal distance at slow, economical speeds than it does a carload of citrus fruit moving in expedited freight service, with all the attendant special services summarized in appellants' original brief. But this is directly contrary to its findings and the above-quoted admission in the Commission's brief. The Commission has found that citrus fruit is more expensive to transport than "dead freight," such as products of mines (R. 73). The court below has likewise found that such products are in fact cheaper to carry (R. 248). The Commission has also found that operating costs in transporting coal are lower than result from the transportation of most other commodities. (*Rates for Transportation of Anthracite Coal*, 35 I. C. C. 220, 261, and *Coal from the Crescent Districts to Detroit, Mich., supra*, p. 199). Finally, as already pointed out, the Commission has several times held (*ante*, p. 82), contrary to its contention here, that any increase in cost because of increased weight in a car is in fact relatively small. A like conclusion is demanded on this record by the testimony of the transportation engineer (R. 1376-91), previously alluded to, but this evidence is put aside by appellees on brief as being "mostly theoretical in nature."

D. The Decision in *Northern Pacific Railway Co., et al.*, vs. *Department of Public Works of the State of Washington, et al.*, 268 U. S. 39, Is No Authority Against the Use of Single System Averages.

One of the criticisms advanced by Southern lines against the Hodkinson studies was thus stated by the court below (R. 254):

> "* * * Stress is put upon the proof which shows that system average costs are based upon the movement of all kinds of commodities, all lengths of haul and loads per car, varying ratios of loaded to empty movements, movements in car load and less than car load lots, on both main and branch lines; and that the petitioners have used an average cost affected by these many different elements to show the cost of transportation of a single commodity which is affected by a marked pecularity in divers respects."

Obviously this was an effort on the part of those advancing the contention to bring it within the doctrine of the case cited in the caption. Since the decision in that case was also referred to in the decision of the court below (R. 245), it will be briefly analyzed.

This was a suit by the Northern Pacific, the Great Northern, the Chicago, Milwaukee & St. Paul, and the Oregon-Washington of the Union Pacific System, to set aside an order of the Department of Public Works of the State of Washington, establishing a uniform distance tariff of rates on logs applicable to these railroads. The order was attacked upon the grounds, among others, that it deprived the carriers of property in violation of the due process clause of

the Fourteenth Amendment and that the prescribed rates were confiscatory.

A precise issue was the cost on *each* railroad of transporting logs in carload lots in western Washington. The department had made certain findings concerning operating costs, based largely upon deductions from data found in published reports of the carriers and in their exhibits filed in the case. In the language of the opinion of this Honorable Court, what the department did is described as follows at page 43:

> "* * * Instead of attempting to show by evidence, reasonably specific and direct, what the actual operating cost of this traffic was to the *several* carriers, *the Department created a* COMPOSITE *figure representing the weighted average operating cost per 1000 gross ton miles of all revenue freight carried on the* FOUR SYSTEMS and made that figure a basis for estimating the operating cost of the log traffic in Washington." (Emphasis supplied.)

This, the opinion said, was clearly erroneous, for the following reasons. The *composite* figure ignored the difference in the *average* unit cost *on the individual* systems; the difference on each system in the cost incident to the different classes of traffic and articles of merchandise, and to the widely varying conditions under which the transportation was conducted. There were other general criticisms sometimes applicable to system average figures. But in the *Northern Pacific case, supra, there was no evidence that the system average costs were less than the special costs of handling logs.* In the present case the record is replete with such evidence; there is an

overwhelming preponderance of testimony to establish that the *Northern lines' respective system costs are less than the special costs of handling citrus fruit.* Moreover, appellants' cost studies in the present case are not subject to the other criticisms of this Court in the *Northern Pacific case, supra.* On the contrary the studies were prepared with the court's criticisms in mind. In the first place, appellants HAVE NOT USED A COMPOSITE unit representing the average operating cost of DIFFERENT CARRIERS, as was the case in the *Northern Pacific case, supra.* The studies are based upon *the individual cost units* as developed for the individual carriers and applied to the particular traffic handled by them. Differences in length of haul have been considered and fully explained in the record. The character of the commodity has been considered and it has been conclusively shown by competent evidence that it is more expensive to handle citrus fruit than the average of all traffic. The configuration of the country, density of traffic, and extent of empty car movement with respect to each of the lines or portions of lines principally used in the handling of citrus traffic have been considered and discussed in the record. The nature of the equipment employed, the extent to which it is used and expenditures required for its maintenance have been considered and proper adjustments made. For example, because the traffic in question moves in refrigerator cars, not owned by the carriers, but for which they pay a rental of 2 cents per car-mile, there have been deducted from the system operating expenses, freight train car repairs, and freight train car depreciation and retirements, before computing the system average total freight car-mile expense.

Moreover, it has been amply demonstrated in the evidence that the unit used by defendants, namely, the system average total freight car miles, is a more dependable and accurate basis than any other known transportation unit for the purpose of estimating the cost of handling light loading commodities such as here involved.

E. The Unwarranted Criticism That the Total Car Mile Unit Used is Merely a Statistical Generalization.

Perhaps the principal remaining criticism against the Hodkinson studies is that of defendants below, to the effect that they rest on a basis which is "merely a statistical generalization" (R. 257). The lower court refers to it as "a statistical generalization of uncertain meaning" (R. 259). Here again it is clear that the effort was to bring the facts of this case within the scope of this court's decisions in *The Minnesota Rate Cases,* 230 U. S. 352, 465, and *Missouri Rate Cases,* 230 U. S. 474, 506. In those cases the state authorities had prescribed a complete schedule of rates covering state operations. The carriers alleged that the resulting rates were confiscatory, and by oral testimony endeavored to prove that the relative ton-mile cost of handling the entire body of intrastate traffic of the state was from three to six, or seven times greater than the cost of handling interstate traffic. The court concluded that oral testimony, based on a general estimate of conditions as to the exact extra cost of intrastate business, could not be accepted without the aid of statistical information, and it stated that it "would appear to have been not

impracticable" to have had "accounts kept or statistics prepared" for selected test periods.

The doctrine of the cases cited is not applicable here for the following reasons:

First, they involved the question of the relative cost of handling *all intrastate traffic* of a particular state as contrasted with the system cost of handling all interstate and intrastate traffic. Here the question is as to the cost of handling a single commodity, namely, citrus fruit.

Second, numerous witnesses for Northern lines testified as to the impracticability of making a direct cost study (R. 1223, 1268, 1277, 1379). This was even admitted by one of the accounting witnesses for Southern lines, who stated that it would have been "impracticable" to make such a study in this case.

Third, in the cases cited, witnesses estimated the extra cost of intrastate business as from "three to six or seven times that of the interstate business per ton-mile," which the court said "shows both the difficulty and the lack of certainty in passing judgment." In the instant case appellants did not try to show the exact ratio that the citrus fruit cost bore to the average cost. It was sufficient for their purposes to show that it cost *no less than the average cost of handling all traffic*. The record shows that experienced operating officials of Northern lines were unanimous in their informed judgment and opinion, based on facts heretofore recited (*ante*, pp. 37-8), that it costs *more* to handle citrus fruit than the average cost of handling all traffic, *and this conclusion is corroborated by the finding of the Interstate Commerce Commission that*

citrus fruit is undoubtedly more expensive to handle than the "ordinary run of freight" (R. 73).

Fourth, the opinions of the operating experts in the instant case were supported by statistical evidence that the *actual unit costs* of handling traffic over the principal parts of the lines of the Pennsylvania and the Baltimore & Ohio used in transporting citrus fruit were *materially higher than the similar system unit costs* (*ante*, pp. 38-9).

Fifth, the court below accepted the general thesis that citrus fruit is more expensive to handle than the average or general run of freight traffic.

Sixth, in the cases cited there was no "suitable discrimination between the interstate and intrastate traffic" in determining the alleged cost ratios. In the instant cases there is no occasion for a similar distinction. Citrus fruit, like other perishable traffic, is handled in special, light-loaded, fast freight trains, and the contrast is between traffic so handled and that of dead freight, in heavy trains, moving at slow, economical speeds. It will be recalled that an expert transportation engineer testified that it requires twice the amount of energy to produce a ton-mile of citrus fruit at double the speed of coal traffic as it does a ton-mile of coal (R. 1381-82); that it requires approximately the same, or a greater amount of, energy to move a carload of light-loaded traffic at high speed as a carload of heavy-loaded traffic at slow speed (R. 1381-82); and that the fuel consumption per car-mile of the light-loaded fast trains will equal or exceed that for the heavy-loaded slow trains (R. 1387).

It is clear from the foregoing facts that the doctrine of *The Minnesota Rate Cases, supra,* has no application here.

F. The Alleged Small Portion of System Lines Used by the Pennsylvania and the Baltimore & Ohio in Handling Citrus Fruit.

In reciting the evidence offered by defendants, the court said:

> "* * * It is pointed out * * * that the average car mile cost is based upon the movement of freight on the entire system, while in the case of the Pennsylvania and the Baltimore & Ohio, comprising 10,000 miles and 4,500 miles of line respectively; less than 15% of the total system mileage was used in the movement of citrus fruit in the season of 1928-1929."

Even if true, this statement has no bearing on the validity of the studies presented. The fact is that, taking the Pennsylvania as illustrative, page 56 of Hodkinson Exhibit No. 2 shows that in the 1928-29 season the Pennsylvania handled citrus fruit traffic to 62 different destinations in five different states in Trunk Line territory. It used substantially every mile of its principal lines from Washington, D. C., to Pittsburgh, Pa. to the west, to Buffalo, N. Y., Rochester, N. Y., Elmira, N. Y. and intermediate points to the north, and to New York City, N. Y. and Atlantic City, N. J. to the east. In Central territory from the Cincinnati gateway the record likewise shows (Hodkinson Ex. No. C-1, p. 32) that traffic was handled to numerous destinations located in six different states. These destinations ranged from Buffalo and Pittsburgh on the east, to Cleveland, Ohio, and Grand Rapids, Mich. on the north, and Indianapolis and Chicago on the west. It is clear that the statement as to the small amount of the Pennsyl-

vania's mileage used in transporting citrus fruit is contrary to uncontrovertible facts. The witness who testified as to the small amount of mileage used took only certain extreme points and "did not add every line individually over which the Pennsylvania Railroad handled the traffic" (R. 1437).

G. The Divisions Accepted By Northern Lines on California Citrus Fruit Are Immaterial to the Issues Here.

In connection with certain testimony offered by Southern lines as to divisions accepted by the Pennsylvania and one other railroad from the rates on California citrus fruit, the court said (R. 258):

> "The willingness of the northern lines to accept voluntarily the prevailing divisions on California citrus fruit, is not without significance. The Pennsylvania and the New York, New Haven and Hartford Railroads accept on the movement of California oranges considerably less revenue than they receive for similar movements under the prescribed divisions on Florida citrus fruit, and it appears that if the expenses on California fruit are determined on the car mile basis, these roads suffer even larger deficits in this respect than those of which they complain in the pending case."

The Commission in its report (R. 51), referring to these divisions, concluded with this statement: "We agree with defendants' statement on brief that for neither the northern nor southern lines do the California divisions constitute a reliable guide."

Upon the former argument of this case, mention was made by counsel for the Commission of the di-

visions accepted by Northern lines on California citrus fruits. It was apparent that this Court was quite familiar with the blanket method of making rates on citrus fruits and other commodities from California to the east, whereby the same rate is applied to New York as to Chicago, though a thousand miles more distant.

It was admitted by Witness Doss, of the Southern lines, on cross examination that Northern lines get the same divisions or proportion on *all traffic interchanged with transcontinental lines* as they do on citrus fruit; that the Southern lines likewise accept the same amounts on traffic interchanged with the transcontinental lines, and that to get an accurate idea of the compensatory character of transcontinental divisions "the whole body" of transcontinental traffic would have to be considered (R. 1508). Under these circumstances, it is obvious that the divisions accepted by the Northern lines on California citrus fruit is utterly immaterial and irrelevant and can have no bearing here.

CONCLUSION

It is indisputable that out of rates not themselves confiscatory the Commission prescribed for Northern lines an extremely low basis of divisions, one not conformable to any usual standards, and one which accorded to Southern lines divisions larger than justice merely as between the parties would ordinarily seem to suggest. This, upon the showing that Southern lines' financial condition was slightly more unfavorable—due mainly to deficits in respect of passenger operation—than of Northern lines.

Under these circumstances the "financial need" doctrine of *New England Divisions Case*, 261 U. S. 184, 194, 195; *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456, 477, and of *United States* v. *Abilene & S. Ry. Co.* 265 U. S. 274, 284, 285, required that the Commission's order to be valid should avoid a confiscatory result to Northern lines.

The Northern carriers, which by their cross-complaint in No. 24069 as to Trunk Line-New England territory and their petition for investigation in No. 24160 covering citrus divisions to Central territory invoked the Commission's jurisdiction to fix reasonable and equitable divisions, could not, in the presentation of their case to it, anticipate that the Commission would depart from the statutory standard, much less the constitutional one. There has been no opportunity to present to it cost evidence with respect to the compensatory character of the *prescribed* divisions and there could not have been until the Commission had made and announced its decision. If and when such evidence became pertinent and necessary, the Commission as the body appointed by law and informed by experience was peculiarly

fitted to consider it and make findings with respect thereto. But the Commission, though the validity of its order was dependent upon avoiding confiscation to Northern lines, refused appellants' request for further hearing on that issue, and, therefore, this Court is without the benefit of the Commission's analysis and findings in regard to such evidence.

Appellants' evidence, while not establishing exact costs, so clearly meets and carries the burden of proving confiscation as to require an avoidance of the Commission's order. *If, in a case like the instant one, such proof were held insufficient, the Constitutional protection assured in divisions cases by the three decisions of this Court last cited would cease to have vitality.*

Upholding appellants' contentions in this case can not circumscribe the Commission's legitimate jurisdiction, or operate to the real detriment to the rights of any party. On the contrary it would establish both on a firmer, surer footing.

The Commission's jurisdiction to prescribe reasonable and equitable divisions having been invoked, it will be necessary, if appellants shall prevail in this Court, for the Commission to proceed further in the cause in accordance with law. That jurisdiction having attached as of the date of the filing of the complaint by Southern lines in No. 24069 and as of the date of its order of investigation in No. 24160, the Commission, in the event its present order is here set aside, will be in a position to deal with the entire controversy and with the rights of all parties in respect of shipments moving to the destination territories subsequent to those respective dates.

Appellants respectfully submit that, having established that the order assailed is in contravention of the Fifth Amendment to the Constitution, and in violation of Section 15(6) of the Interstate Commerce Act, the decree of the lower court should be reversed and the case remanded with instructions that the injunction sought be granted, and the cause be remanded to the Interstate Commerce Commission for further consideration.

Respectfully submitted,

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